IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926

No. [redacted] 67

CITY OF HAMMOND, a municipal corporation,

Petitioner,

vs.

SCHAPPI BUS LINE, Incorporated,

Respondent.

RESPONDENT'S BRIEF

WILLIAM J. WHINERY,

Attorney for Respondent.

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"STATEMENT OF THE CASE"

(A) Nature of the Action.

This cause comes to the Supreme Court of the United States on writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. The petitioner to date, at least, has filed no brief except the brief filed in support of its petition for a writ of certiorari.

This cause came to the Circuit Court of Appeals for the Seventh Circuit from the United States District Court of Indiana on an appeal taken by respondent from said last named court from an order refusing to grant a temporary injunction.

The United States Circuit Court of Appeals for the Seventh Circuit heard the case fully and rendered an

opinion March 12th, 1926, reversing the order and decree of the United States District Court of Indiana, and directing that a decree, granting the injunction prayed for by respondent, be entered. The opinion of the United States Circuit Court of Appeals is reported in Volume 11, Federal Reporter, Second Series, page 940, and entitled: "Schappi Bus Line, Incorporated, Appellant v. City of Hammond, a municipal corporation, Appellee."

(B) Grounds on Which the Jurisdiction of This Court is Invoked.

The respondent filed its bill of complaint for an injunction in the United States District Court for the District of Indiana, Hammond Division, on July 28, 1925. (Rec. 1 to 27.) The cause was heard before the Honorable Thomas W. Slick, one of the Judges of said United States District Court for the District of Indiana, on the 6th day of August, A. D. 1925 on motion for a preliminary injunction, and further heard on August 17, A. D. 1925 (Rec. 27 to 29) and taken under advisement until the 14th day of September, A. D. 1925, (Rec. 32 to 33) on which latter date the cause was again taken under advisement by the Judge of said District Court until September 21, A. D. 1925, (Rec. 76 to 77) when the said Judge of said Court, having heard all the evidence, refused to grant said temporary injunction, and denied said temporary injunction prayed for by the plaintiff, to which rulings of the said Judge of said Court the plaintiff at the time duly excepted and prayed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. (Rec. 76 to 77). The respondent herein perfected its appeal to said United States Circuit Court of Appeals for the Seventh Circuit in the form and manner required, (Rec. 77 to 99) and the cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit before the Full Court on Tuesday, January 26, A. D. 1926, and taken under advisement;

(Rec. 100) and, afterwards, on the 12th day of March, A. D. 1926, said United States Circuit Court of Appeals rendered its opinion in said cause, reversing the judgment of the District Court and directing it to enter a decree granting the injunction prayed for by respondent. (Rec. p. 100 to 106).

The respondent is a corporation organized under the laws of the State of Illinois, engaged chiefly in interstate commerce in the carrying of passengers for hire on, upon, and over the public highways of the states of Illinois and Indiana, between the city of Chicago in the state of Illinois and the city of Hammond in the state of Indiana, and to other points in the state of Indiana. The diversity of citizenship existing between the respondent and the petitioner gave to the United States District Court for the District of Indiana jurisdiction over the parties and the subject matter. (See: Bill of Complaint, Rec. 2 to 27).

The evidence introduced on the hearing for a preliminary injunction consisted of the following:—

(a) The verified bill of complaint for injunction. (Rec. 2 to 27).

(b) The answer of the defendant City of Hammond to the bill of complaint. (Rec. 29 to 32).

(c) Certificates of Public Convenience and Necessity numbered 324-M, 325-M, 326-M and 327-M issued by the State of Indiana through its Public Service Commission to the respondent, authorizing it to operate its motor vehicles as common carriers in the carrying of passengers for hire upon certain public highways in the State of Indiana. (Rec. 35 to 50).

(d) A certified transcript of the proceedings and judgment in cause Number 10624 in the City Court of Hammond, entitled: "City of Hammond v. Clarence E. Dome", where, in a suit brought to prosecute said Dome

under Ordinance Number 1945 of said City, the City Court of Hammond held such ordinance void. Upon objection this offered evidence was excluded by the Judge of the United States District Court. (Rec. 50 to 51).

(e) The certified copy of Ordinance Number 1945 of the City of Hammond, being an ordinance entitled: "An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets within the City of Hammond". (Rec. 51 to 53). Said Ordinance Number 1945 was also set forth at length in the bill of complaint and alleged to be discriminatory and void, etc. (Rec. 15 to 27).

(f) The affidavit of Daniel Brown, marked Defendant's "Exhibit 1", introduced in evidence by the petitioner City of Hammond in opposition to the granting of the temporary injunction as prayed for in the bill of complaint. (Rec. 53 to 61).

(g) A map, marked "Exhibit A", in the affidavit of Daniel Brown, showing the City of Hammond, Indiana, and its relation to the City of Chicago, Illinois; the streets in the City of Hammond sought to be prohibited to respondent, etc. (Rec. 61 to 65).

(h) The affidavits of Henry Schappi and Henry Schappi, Jr., marked Plaintiff's "Exhibit 10" offered in evidence in rebuttal by respondent. (Rec. 65 to 74).

And this was all the evidence given in the cause. (Rec. 74 to 75).

(i) The respondent, in this Court, assigned as errors on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the interlocutory decree of the United States District Court of Indiana, refusing to grant a preliminary injunction, that said District Court erred in refusing to grant said preliminary injunction and from enjoining said City of Hammond, its agents and servants from interfering with the respondent's busi-

ness in the carrying of passengers for hire as a common carrier of motor vehicles; (Rec. 79 to 80) that it was authorized to carry passengers as a common carrier on the public highways in the State of Indiana as a common carrier by reason of the certificates of public convenience and necessity issued to it by the Public Service Commission of Indiana; that the ordinance, under which the City of Hammond was undertaking to prosecute the respondent's employees was unlawful, as denying to the respondent equal protection of the laws, and depriving it of its property without due process of law; also, that the acts of the petitioner City violated Section 8 of Article I of the United States Constitution, giving to Congress exclusive jurisdiction over interstate commerce among the several states. (Rec. 80 to 81). That the action of the City of Hammond was unlawful in denying to the petitioner its natural rights in the carrying on of the business permitted to be carried on by others without discrimination; that the city Ordinance Number 1945 discriminated against the respondent and attempted to make it unlawful for the respondent to carry on its business, notwithstanding that the State of Indiana had authorized it so to do; that the ordinance was void for indefiniteness and uncertainty and for discrimination and in that it contravenes the commerce clause of the United States Constitution. (Rec. 81 to 83). That the Ordinance Number 1945 was void and unreasonable in that it gave to the Board of Public Works of said city an arbitrary power to deny to the respondent the right to carry on its business while authorizing others, similarly situated, to carry on a similar business; all of which grounds were definitely and specifically set forth is the assignment of errors made by respondent on said appeal as set forth in the printed record herein, pages 79 to 87 inclusive.

(j) The United States Circuit Court of Appeals for the Seventh Circuit, having jurisdiction of such appeal

from the United States District Court for the District of Indiana, fully heard said cause on appeal and said Court, after stating the principal facts and setting forth said Ordinance Number 1945 of the City of Hammond in full, held that:

> "There are several reasons why we are of the opinion that the bill should not have been dismissed, but we deem it necessary to consider but one." (Rec. 100 to 103).

The one reason considered and discussed in the opinion of the United States Circuit Court of Appeals was, that, said Ordinance Number 1945 unlawfully discriminated against the respondent; that said ordinance was claimed to be a police regulation and that it was not fair and reasonable for all persons alike; but, instead, that it was discriminatory and therefore unreasonable, illegal and void, and that the judgment of the United States District Court should be reversed, with directions to enter a decree granting the injunction prayed for by respondent. (Rec. 102 to 105).

(C) Omissions and Inaccuracies in Petitioner's Petition and Brief, Etc.

There are a great number of erroneous and incorrect statements in the petition and brief and argument filed by the City of Hammond in this court.

FIRST: At page four of the petitioner's brief a point is sought to be made against the opinion of the United States Circuit Court of Appeals in that it appears that a typographical error occurred in the opinion by which the opinion of the Circuit Court of Appeals states that the respondent, "appellant, incorporated under the laws of the State of Indiana," etc. (Rec. 101), instead of stating that respondent is incorporated under the laws of the State of Illinois. The opinion of the Circuit Court of Appeals, together with the entire printed record, shows this point to be without merit and that the word "Indi-

ana" is a mere misprint. It in no way affects the reasoning nor soundness of the opinion of the Circuit Court of Appeals.

SECOND: Also on page four of the petition of the City of Hammond at page two, an attempt is made by the petitioner to change the position taken in the Circuit Court of Appeals, and to claim that what was there argued to be a proper police regulation is here contended to be an exercise of the general police power, etc. This position of the petitioner is untenable and is an attempt to change positions in this Court from the position assumed in the United States Circuit Court of Appeals. (See: Opinion, Rec. 102 to 105).

THIRD: By the third point, pages four to five of the petitioner's petition and brief, an incorrect statement is made in Point 3-a, in this, that an attempt is made to say that Section 99 of Indiana Laws 1913, Chapter 76, page 201, provides that:

> *"No license, permit or franchise to own, operate, manage, or control, any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana, or to a citizen of such state";*

but respondent submits that said section of Indiana Laws has no application whatever to the instant case for the reason, that it was not until the adoption of Chapter 46, Acts of 1925 Indiana General Assembly, pages 138 to 142 inclusive, that carriers of persons and property by motor vehicle for hire were regarded as public utilities, and by Section 1 of said Chapter 46, which is complete in itself, no limitation as to corporations organized under the laws of any state was made; also, that the previous law, relating to public utilities, being Chapter 76, Acts of 1913, supra, was only made applicable to motor vehicle carriers *"in so far as the terms and provisions of*

of said act may be reasonably applicable to such carriers", said Section 1 of said Chapter 64, Acts of 1925, supra, being as follows:

> "That *every corporation*, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town that now or hereafter may own, operate, manage or control any motor vehicle, *except as hereinafter provided*, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana, is hereby declared to be a public utility within the meaning of the act of the General Assembly of the State of Indiana, entitled: 'An Act Concerning Public Utilities; Creating a Public Service Commission; Abolishing the Railroad Commission of Indiana and Conferring the Powers of the Railroad Commission on the Public Service Commission, Approved March 4, 1913'; and, except as herein provided, subject to all the terms and provisions of said act *"in so far as the terms and provisions of said act may be reasonably applicable to such carriers."*
>
> See: Chapter 46, Acts of Indiana General Assembly, 1925, pp. 138 to 142 inclusive.

Thus it will be seen that Chapter 46, Acts of Indiana General Assembly 1925, supra, made no limitation as to persons, corporations, companies, individuals, etc., who may act as carriers of persons and property by motor vehicle and no limitation is made in any law of Indiana in this regard. The erroneous statement and contention of the petitioner is, notwithstanding, repeated also at page 15 of the petitioner's petition and brief.

FOURTH: Also, at pages five to six of the petitioner's petition and brief, points 3-b and 4, and at many other places throughout the petitioner's petition and brief, it is sought to claim that the City of Hammond had granted a franchise to the Calumet Motor Coach Company for the transportation of persons and property by motor

vehicle for compensation, but it will be noted that no statute and no law, nor authority of any kind or character, is cited or referred to in any manner in the petition and brief of the petitioner, giving authority or purporting to give authority to the petitioner, City of Hammond, to grant any such purported franchise, and the respondent submits that *no such law exists in the State of Indiana, either statutory or otherwise.* It is a settled rule of law in Indiana that all doubtful claims to power are resolved against the city. (See: *Pittsburgh, etc., Ry. Co.* v. *Town of Crown Point,* 146 Ind. 421.)

See also: *Eichels* v. *Evansville Street Ry Co.,* 78 Ind. 261, at p. 263.
Logan v. *Pine,* 43 Iowa 524 (22 Amer. Reps. 261, at p. 263).
Elizabeth City v. *Banks,* 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
City of Dallas v. *Gill,* Texas Civil Appeals 1918 (199 S. W. 1144).

The authorities last above cited conclusively show that a municipal corporation cannot grant a franchise without express statutory authority, and respondent submits that in Indiana no such express statutory authority exists, and never has existed. Hence, the petitioner has inaccurately and erroneously attempted to contend for a position that is not within the facts and law applicable to the record.

But, even though a municipal corporation has power to grant a franchise, still, it does not, by granting a franchise, relinquish its police power over the same. Neither the state nor any municipality may alienate or relinquish its police power by granting a franchise or otherwise. To attempt to do so would be against public policy and void.

See: *City of New Albany* v. *New Albany Street R. R. Co.,* 172 Ind. 487 at p. 490.
Central Union Telephone Co. v. *Indianapolis Telephone Co.,* 189 Ind. 210 at p. 223.

And all police regulation must, in order to be valid, specify the rules and conditions to be observed, and be uniform and general in their applications, so that all persons alike may comply with the same, and such ordinances must not admit of an opportunity for the exercise of arbitrary discrimination by municipal authorities.

See: *City of Richmond* v. *Dudley*, 129 Ind. 112 at pp. 115 to 117.

FIFTH: An incorrect and misleading position is further assumed by the petitioner in Point 3-b, pages five to six of the petitioner's petition and brief filed in this court, in this, that as an attempted defense to the respondent's complaint for an injunction, the petitioner seeks to rely upon the proviso in Section 5 of Chapter 46, Acts of 1925 Indiana General Assembly, but respondent submits that this proviso does not in any sense grant, or attempt to grant, power to a municipality to grant a franchise. This proviso must be read in conjunction with Sections 1 and 2 of said Act set forth in Point THIRD supra, in that, the Legislature simply attempted by the proviso not to impair any possible contract that any city or town had made for operating, managing or controlling motor vehicles in the carrying of passengers for hire, which contract, if any, existed at the time the legislature passed said Chapter 46 of the Acts of 1925, providing for the regulation of motor vehicles engaged in carrying passengers for hire on the public highways of the State, and as the jurisdiction was given by the Legislature to the Public Service Commission of Indiana to give the Act a reasonable and valid interpretation, it must be held that any city or town operating, managing or controlling any motor vehicle carrying passengers for hire by motor vehicle under any "color of a contract" became, by virtue of said Chapter 46, in a sense at least, a public utility subject to the jurisdiction of the Public Service

Commission, and subject to all the provisions of said Chapter 46, supra.

See: Chapter 46 Indiana Laws 1925, pp. 138 to 140, Appendix A.

SIXTH: The petitioner has failed to make a concise statement of the facts in its petition and brief so far filed herein, clearly presenting the real questions for consideration. The "Statement of the Case" found in the petitioner's brief, pages 2 to 4, and also pages 14 to 17, is insufficient as it omits all of the important and essential facts shown by the bill of complaint, and which essential facts are of controlling importance in the determination of this case. All of these facts are set forth in the bill of complaint marked "Plaintiff's Exhibit 1"; and, to avoid repetition, reference is made to the printed record where the same is fully set forth, pages 2 to 27 inclusive.

There was little or no dispute in the facts as set forth in respondent's bill of complaint.

(D) The Questions Involved.

Under the facts, shown in evidence, the specific questions involved may be stated as follows:

1. Can petitioner, City of Hammond, lawfully interfere with, regulate, prevent, or prohibit respondent from carrying passengers for hire when engaged in interstate commerce, such as is shown by the facts?

2. Can the power and exclusive jurisdiction, vested in the Congress of the United States by Section 8 of Article I of the United States Constitution over commerce among the several states, be lawfully handicapped, burdened, regulated, or prevented, by petitioner, City of Hammond, by means of unfriendly ordinances, discriminations, or otherwise, such as is shown by the facts?

3. Can the City of Hammond, a municipal corporation, lawfully disregard, or collaterally attack, the Certificates of Public Convenience and Necessity issued to respondent by the Public Service Commission of Indiana, as shown by the facts?

4. Is not the jurisdiction over carriers of passengers by motor vehicles on the public highways in the State of Indiana given to the Public Service Commission of Indiana, by the provisions of Chapter 46, pages 138 to 142, inclusive, of the Acts of the General Assembly of the State of Indiana for the year 1925, superior to any purported authority, if any, which may have been delegated by the State of Indiana to the City of Hammond, as a municipal corporation in said State?

5. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts; and under which said petitioner City purports to act in burdening, preventing, and prohibiting respondent from carrying on its business in the carrying of passengers for hire, while engaged both in interstate commerce and intrastate commerce, unreasonable, illegal, and void, as being in conflict with the provisions of both the United States Constitution, Section 8, Article I, and the 14th Amendment thereto; and, also, in violation of Section 23, Article I, of the Indiana Constitution?

6. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts, and under which said petitioner City purports to act, unreasonable and invalid as vesting the Board of Public Works of said City with arbitrary power to determine who it will, or will not, permit to use the streets of said City in the carrying of passengers for hire, without furnishing any uniform rule of action governing such determination?

7. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts, and under which said petitioner

City purports to act, unreasonable and invalid as shown upon its face, in that: it discriminates against all carriers not having some contract or color of contract with said City?

8. Does it not appear on the face of said ordinance, shown in evidence, that its primary purpose is not regulation, with a view to safety or to conservation of the highways, but the prohibition of competition; for it determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons while permitting it to others for the same purpose and in the same manner; and it leaves the determination whether the prohibition shall be applied to the arbitrary discretion of the Board of Public Works of the City of Hammond, wherein the test and jurisdiction over interstate commerce, at least, is peculiarly within the Congress of the United States.

See: *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303.)

9. Can the City of Hammond lawfully prohibit the respondent from operating its motor buses in the carrying of passengers for hire, while engaged in interstate commerce, over the streets and public highways within said City of Hammond; and can petitioner, City of Hammond, also lawfully prohibit respondent, while so operating its motor buses, from stopping to permit passengers to alight from such buses upon the public highways in said City, and from stopping to pick up such passengers on the public streets of said City, so long as such stopping of respondents' motor buses is not for such a length of time as to be, or become, a public nuisance?

10. Respondent contends that a proper application of the law to the issues and facts in answer to the foregoing questions, and to other questions which may suggest

themselves upon the issues and facts shown in evidence, will show conclusively, that, the United States District Court for the District of Indiana erred in failing and refusing to grant a preliminary injunction in this cause, as prayed for by respondent; and that the opinion of the United States Circuit Court of Appeals, reversing the District Court, is correct.

(E) "Contested Issues."

There is little or no conflict in the facts shown in evidence in the instant case on any essential point.

The questions involved are, rather, questions of law, arising under the issues and the undisputed facts.

Respondent operates in Indiana under Certificates of Public Convenience and Necessity, issued to it by the Public Service Commission of the State of Indiana, over each of the routes and public highways specified in such Certificates. It has obtained, from the State of Indiana, all licenses and permits required by the laws of said state. It also has obtained licenses and permits as required by the State of Illinois, and is engaged in the carrying of passengers for hire between the two states. Its buses are registered in both states; its chauffeurs are licensed and competent, and in all other respects it has complied with the laws of such states regulating buses for hire; its buses are of an improved type, and it has developed a profitable business, with a substantial good will among the people who travel; its lines supply the principal means of transportation locally, between Calumet City, Illinois, and the cities of Hammond and East Chicago, Indiana, and the City of Chicago, Illinois. In the conduct of its business it carries on both interstate and intrastate business, principally interstate. The conduct of its business is a substantial convenience and advantage to the people served in both states.

But petitioner, City of Hammond, has undertaken to prevent and prohibit respondent from the further conduct of such business. The passage of Ordinance No. 1945 by said City of Hammond was for no other purpose than to be used in excluding respondent from carrying on the business of carrying passengers for hire over the public highways within said City, either as an interstate carrier or as an intrastate carrier.

By section 1 of said ordinance it is provided, that:

> *"It shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over, any of the following parts of streets within said City of Hammond."* (Naming certain streets.)

(See: Printed Record, p. 16.)

Reference to the map, marked Exhibit "A" in the affidavit of Daniel Brown (Printed Record, p. 65) will show that the streets, named in Section 1 of said ordinance, have the effect of excluding respondent from all the business section of said City, thus making it impossible to carry on respondent's business without violating the first section of said ordinance as the streets named prevent the entering or passing through the central or business portion of the City of Hammond, as required by the conduct of respondent's business in the carrying of passengers for hire.

This Section 1 of the ordinance also purports to exclude respondent from the very streets and public highways in said City of Hammond over which the Certificate of Public Convenience and Necessity, issued to respondent by the Public Service Commission of Indiana, authorized it to operate. Hence, there is a clear conflict of authority between the Public Service Commission of Indiana and the City of Hammond upon this point. (See:

Printed Record, pp. 5 to 27 and 35 to 50, Plaintiff's Exhibits "3," "4," "5," and "6.")

Section 2 of said ordinance makes it *unlawful for any operator to stop for the purpose of receiving or discharg passengers upon any street, alley, or other public place within said City.* (See: Printed Record, pp. 16 to 17.

This provision conclusively excludes respondent from the entire City of Hammond, whether it be in the conduct of interstate or intrastate business, unless, perchance, respondent may obtain a permit from the Board of Public Works of said City to so stop on certain named streets of said City for a period not exceeding six (6) months. No uniform rule, or rule of any kind, is provided as to the manner of determining whether such Board of Public Works shall issue or grant such a permit, and the question of whether it shall, or shall not, grant such a permit is left wholly to the uncontrolled, arbitrary discretion of such Board. (See: Printed Record pp. 51 to 52.)

Reference to the map, page 65 of the printed record, shows that this further exclusion, provided in Section 2 of the ordinance, has the effect simply to more completely and conclusively exclude respondent from approximately all of the City of Hammond; the region being bounded by Columbia Avenue on the east, State Line Street on the west, 122nd Street on the north, and all the principal cross streets within such City.

Still, again, by Section 2 of said ordinance, even *permission to operate, or to stop to take on or let off passengers in said City of Hammond, may only be granted by said Board of Public Works to persons engaged in interstate commerce, as to streets north of 122nd Street and east of Calumet Avenue.* (See: Printed Record, p. 52.)

Reference to the map, shown in the printed record, page 65, shows *that this provision of the ordinance ex-*

tirely prohibits respondent from carrying on its interstate business between the City of Hammond and the City of Chicago, as respondent would not be permitted, without violating the ordinance, to come south of the intersection of 122nd Street and Calumet Avenue, which means that respondent is entirely excluded and prohibited from carrying on its business, even though it be strictly interstate commerce,—Calumet Avenue being the only available route between Hammond and Chicago over which respondent may pass, and over which street, also, the Public Service Commission of Indiana has expressly granted respondent the right to carry on its business, after a full hearing, as shown by Plaintiff's Exhibit "4." (See: Printed Record, pp. 39 to 44.)

Again, the undisputed evidence shows, that, respondent has *asked permission of the Board of Public Works of said City of Hammond to drive its motor buses over said Hohman Street, enroute to Chicago, Illinois, and to stop thereon to let off and take on passengers, and that such permission has been arbitrarily refused by such Board.* (See: Printed Record, pp. 24 to 25.)

By Section 3 of said ordinance it is provided that a fine, not exceeding $50.00, shall be assessed for each and every offense arising under the provisions of said Sections 1 and 2 of said ordinance; and it is further provided, however, *in order to further discriminate against respondent and other carriers, similarly situated, that the ordinance shall not apply to a carrier having a contract, or color of contract, with said petitioners City, which Section 3 the Mayor and police officers of said City have construed to mean that it applies to respondent, and all carriers of passengers, except the Calumet Motor Coach Company.* (See: Printed Record, p. 52.)

Thus, it is conclusively shown that *the primary purpose of said ordinance is not regulation, with a view to safety*

or conservation of the highways, but the prohibition of competition; for said ordinance determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons, while permitting it to others for the same purpose, and in the same manner; and it leaves the determination whether the prohibition shall be applied to the arbitrary, uncontrolled discretion of the Board of Public Works of the City of Hammond.

Said ordinance is entire, and each part has a general influence over the rest; and, therefore, if one part of said ordinance is void, the entire ordinance is void, because all parts are so connected as to be essential to each other, and part of the ordinance, therefore, being void, the entire ordinance must be declared void, as respondent contends that it is. (See: *Buck* v. *Kuykendahl,* United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 301 to 303.)

"BRIEF OF ARGUMENT"

(A) The United States District Court, for the District of Indiana, Erred in Refusing to Grant a Preliminary Injunction, and the United States Circuit Court of Appeals for the Seventh Circuit Rightly Reversed the District Court.

I

The undisputed facts in evidence, on the hearing for a preliminary injunction, showed that respondent was engaged principally in carrying interstate passengers between the states of Illinois and Indiana by means of motor vehicles; and that petitioner, City of Hammond, was unlawfully burdening and interfering with respondent's said business, to the great damage of respondent.

The evidence further showed, that, respondent had complied with all the laws of the State of Indiana, and the State of Illinois, relating to such common carriers of passengers for hire; and that the Public Service Commission of Indiana had issued to respondent Certificates of Public Convenience and Necessity, specifically authorizing and empowering respondent to carry on such business within the State of Indiana and within said City of Hammond, over the streets and public highways in said State, as specified in such Certificates of Public Convenience and Necessity. Such a showing entitled respondent, as a matter of law and equity, to a preliminary injunction.

See: *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303.)

Bush & Sons Co. v. *Maloy,* United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305.)

Michigan Public Utilities Commission v. *Duke,* United States Supreme Court, January 12, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions Nos. 6 and 7, pages 207 to 209.)

McNealy v. *Mayor and Board of Aldermen of the City of Natchez,* C. C. A., 5th Cir., March 31, 1925. (Federal Reporter, 2nd Series, Vol. 4, pages 899 to 900.)

Long, Mayor, et. al. v. *Miller,* U. S. C. C. A., 5th Cir., 262 Fed. 362.

Wabash, etc. Ry. Co. v. *Illinois,* 118 U. S. 557. (30 Law Ed. 244.)

Brimmer v. *Rebman,* 138 U. S. 78. (34 Law Ed. 862.)

Gloucester Ferry Co. v. *Commonwealth of Penna.,* 114 U. S. 196. (29 Law Ed. 158.)

Newport Electric Corporation v. *Oakley,* R. I. Supreme Court, June 24, 1925. (129 Alt. 613.)

II

Analysis of Provisions of Chapter 46, Acts of 1925, Indiana General Assembly.

The Indiana Legislature, at its 1925 Session, passed AN ACT entitled "An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana," and supplemental to an Act entitled, "An Act Concerning Public Utilities, creating a Public Service Commission, abolishing the Railway Commission of Indiana, and conferring the powers of the Railway Commission on the Public Service Commission, approved March 4, 1913, and declaring an emergency;" approved March 4, 1925, the same being Chapter 46, pages 138 to 142, of the Acts of the General Assembly for the State of Indiana for the year 1925.

By this Act, Section 1, it is provided, in substance, that:

(a) Every person or corporation, carrying passengers for hire upon the public highways of the State of Indiana, is declared to be a public utility, and placed within the jurisdiction of the Public Service Commission, and subject to the provisions of the Public Utilities' Law of said State, "insofar as the terms and provisions of said Act may be reasonably applicable to such carriers.

(b) By Section 2 of said Act provision is made for the issuing, by the Public Service Commission of Indiana, of Certificates of Public Convenience and Necessity to such carriers, authorizing them to carry on such business, and it is made unlawful to operate a motor vehicle in the carrying of passengers for hire, without having obtained such Certificate.

Section 2 of said Act further establishes the status of such certificates *as property* of such carrier, which may be sold, assigned, leased, bequeathed, or transferred, as other property, upon the approval of the Commission.

(c) By Section 3 of said Act provision is made that every carrier of passengers for hire shall furnish protection or indemnifying insurance, to be approved by the Public Service Commission, and that it shall be unlawful to operate a motor vehicle, in the carrying of passengers, without first having deposited such insurance policy with said Commission.

(d) By Section 9 of said Act it is provided, that:

> "All legal and equitable remedies of a civil nature to enforce the provisions of this Act, or of any lawful order, rule, or regulation made pursuant hereto, may be used by said Commission, or any person or corporation having a special interest in such enforcement."

(e) The entire Act, Chapter 46, Acts of 1925, is comprised of ten sections and, for convenience in reference, we have printed it in this brief as "Appendix A" in

full. It is under this enactment of the Legislature that each of the Certificates of Public Convenience and Necessity were issued to, and obtained by, respondent from the Public Service Commission of Indiana, as shown in evidence, authorizing respondent to carry on its business in the State of Indiana over the routes, shown in evidence, as a common carrier of passengers for hire, both as an intrastate and an interstate carrier.

(f) By Section 8 of said Act, it is provided, that:

> "Any person, firm, or corporation, which shall violate any of the provisions of this Act, or fail, or refuse to obey any lawful order of the Public Service Commission of Indiana made hereunder, shall, on conviction, be fined not less than $10.00, or more than $100.00, for each offense, and each day such violation shall continue shall constitute a separate offense."

(g) Respondent contends, therefore, that said Act, Chapter 46 of the Acts of 1925, thus placing motor vehicle carriers of persons for hire under the jurisdiction of the Public Service Commission, gave to such Commission full and exclusive jurisdiction over such carriers throughout the State of Indiana; and, also, gave the Commission jurisdiction to establish service over routes in the City of Hammond, or in cities and towns contiguous thereto, and other cities throughout the State of Indiana, except only where such service, if any, would compete with service on routes, which were established in whole or in part under contract at the time the said Act became effective, namely: April 28, 1925,—the date of the Governor's Proclamation.

Further, that, such power, if any, as the City of Hammond has, may be exercised only within its incorporated territory upon such carriers, who, at the time said Act became effective, operated under or by color of a contract with said City, and entirely within its incorporated territory.

And still further, that, all other carriers within such City are within the jurisdiction of the Public Service Commission only, and subject to the provisions of said law.

(h) In Section 5 of said Act provision is made that said Act shall not apply to taxicabs, hotel, funeral and school buses; and also the following provision is contained therein:

> "Provided further, that, in any city or town of this state where motor transportation is now furnished under or by color of a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate *such service*, and to determine when, if at all, for public convenience and necessity, competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to an appeal to, and review by, the Circuit or Superior Courts of the County upon complaint of any interested person, filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court."

As to said proviso in Section 5 of said Act, respondent says:

1. That said proviso is unconstitutional and void, as being in violation of Section 19 of Article IV of the Indiana Constitution, which requires that; "*Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.*" Said proviso is not indicated in any way by the title of said Act, nor is it connected with the subject matter expressed in the title of said Act.

See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Section 115.
Mewherter v. *Price*, 11 Ind. 199 at p. 202.

Henderson v. *London & Lancashire Ins. Co.*, 135 Ind. 23 at pp. 24 to 31, incl.
Dickson v. *Poe*, 159 Ind. 492 at pp. 494 to 498.
Wabash R. R. Co. v. *Young*, 162 Ind. 102 at pp. 103 to 105.
State ex rel Western Construction Co. v. *Board of Commissioners*, 166 Ind. 162 at pp. 196 to 198.
State v. *Dorsey*, 167, Ind. 199 at p. 204.
Indianapolis Northern Traction Co. v. *Brennan*, 174 Ind. 1 at pp. 54 to 56.

2. Said proviso is also unconstitutional and void, as being in conflict with Sections 22 and 23 of Article IV of the Indiana Constitution, restricting the power of the Legislature of said State to pass local or special laws, because said proviso attempts to create an arbitrary classification of cities and towns, not bearing any reasonable or just relation to the subject matter of the Act, and in respect of which the classification is proposed.

See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Sections 118 and 119.
School City of Rushville v. *Hayes*, 162 Ind. 193 at pp. 201 to 203.
Town of Longview v. *City of Crawfordsville*, 164 Ind. 117 at pp. 121 to 125.
Marion Trust Co. v. *Bennett*, 169 Ind. 346 at p. 350.
Board v. *Jackson*, 173 Ind. 76 at p. 87.
Bullock v. *Robinson*, 176 Ind. 198 at pp. 203 to 204.
Gulf, etc., Ry. Co. v. *Ellis*, 165 U. S. 150. (41 Law Ed. 666 at p. 668.)

3. Said proviso is also unconstitutional and void, as being in conflict with the 14th Amendment to the United States Constitution, in that: it denies to the inhabitants of the city of Hammond, and the patrons of respondent, and to respondent, the equal protection of the laws by such attempted arbitrary classification that is attempted to be made by said proviso.

See: *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S. 150. (41 Law Ed. 666 at p. 668.)

4. Said proviso, if valid, is, by its express terms, restricted to "such service" of motor transportation as existed, or was being furnished under contract with said City, within said City of Hammond, at the time said Act took effect, and to such additional service as might compete therewith. All other carriers, not operating under contract with said City of Hammond within said City, were placed under the jurisdiction of the Public Service Commission.

See: Chapter 46, Acts of 1925, Indiana General Assembly, pages 138 to 142. Appendix A.

(i) Respondent contends, therefore, that, having obtained Certificates of Public Convenience and Necessity from the Public Service Commission, as shown in evidence and as provided for in said Chapter 46 of the Acts of 1925, Indiana General Assembly, that it had a legal right to operate its auto buses in the carrying of passengers for hire over the public highways and streets within the City of Hammond, without interference or molestation from said City, and that the United States District Court, for the District of Indiana, erred in refusing to grant a preliminary injunction, as prayed for, and that the opinion of the United States Circuit Court of Appeals is correct.

III

Analysis of Provisions of Chapter 213, Acts of 1925, Indiana General Assembly.

In addition to said Chapter 46, outlined in Point II, supra, the Indiana Legislature, at its 1925 Session, passed a further Act regarding "*automobile regulation*" entitled:

"An Act providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, *for the regulation of the use and operation thereof on the public highways,* defining chauffeurs, and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles, and motor trucks for which storage, supplies, or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof." Approved March 14, 1925, the same being Chapter 213, pages 570 to 607, inclusive, of the Acts of the General Assembly of the State of Indiana for the year 1925.

(a) By Section 1 of said Act certain words and phrases, used in said Act, are specifically defined, such as: "motor vehicle," "motor trucks," "delivery cars," "local authorities," "public highways," and "auto bus."

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 570 to 571.

(b) By Section 9 of said Act the registration and license fee for all motor vehicles, *including "auto buses" engaged in both intrastate and interstate transportation of passengers on the public highways of the State,* are provided for.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 575 to 578.

(c) By Section 14 of said Act the limitations for municipal licenses of motor trucks, delivery cars, and other passenger cars, are defined in any city or town in the State of Indiana; and providing that such license, issued by any city or town, shall be good in any other city or town within the State; and, that, only one such license shall be required.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 579.

(d) By Section 33 of said Act provision is made for the kind and character of *lights required upon every motor bus, transporting passengers for hire.*

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 591 to 592.

(e) By Section 44 of said Act it is provided, that, no fees on motor vehicles shall be charged, except state fees, with the exception of motor trucks, motor driven commercial vehicles, and motor vehicles used in transporting passengers for hire.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 597.

(f) By Section 45 of said Act it is provided, that, except as provided in said Act:

> *"No city, town, or other municipal corporation, shall have any power or authority to make any ordinance, by-laws, or resolution, limiting or restricting the use or speed of motor vehicles, or motor bicycles, and no ordinance, by-laws, or resolution, heretofore or hereafter made by any city, town, or other municipal corporation within this state, by whatever name known or designated, in respect to, or limiting the use of, motor vehicles or motor bicycles, shall have any force, effect, or validity, and all such ordinances, by-laws, and resolutions are hereby declared to be of no validity or effect."*

And, further, limiting and defining the power of such cities, towns, and other municipal corporations, as to motor trucks and motor driven commercial vehicles used within the limits of such municipal corporation for hire, and for the making and enforcing of reasonable traffic and other regulations.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 597 to 598.

(g) By Sections 46 and 47 of said Act, local authorities are given a limited jurisdiction in public parks and cemeteries over motor vehicles used therein.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 598.

(h) By Section 53 of said Act a limited authority is given to—

> "the proper authorities of cities and towns to designate certain streets or boulevards as preferential traffic streets and highways, and prescribe rules regulating traffic crossing over or turning into such streets or boulevards, and such authorities shall, likewise, have the power to regulate the traffic at such points or street intersections where traffic officers or automatic signals are stationed."

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 602.

(i) By Section 62 of said Act of all laws, and parts of laws, in conflict with said Act, Chapter 213, are repealed.

Section 63 of said Act contained an emergency clause whereby said Act took effect upon passage and approval by the Governor, and the same was approved March 14th, 1925.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 607.

(j) Respondent contends, therefore, that by said Chapter 46 of the Acts of the General Assembly of Indiana for 1925, and by said Chapter 213 of the Acts of the General Assembly of Indiana for the year 1925, that *the Legislature expressly, and by implication, withdrew from all municipalities all power, authority, and jurisdiction which may, theretofore, have been delegated to such municipalities for the regulation and use, and operation, on the public highways of the state, of motor vehicles, except such power as is shown to have been expressly provided for in said Acts.*

Also, that the State, through said Chapter 46, giving jurisdiction to the Public Service Commission of Indiana, *delegated a power to a new agent to regulate carriers of persons by motor vehicles for hire on the public highways of the State of Indiana, which power, so given to the Public Service Commission of Indiana, is exclusive of all other agencies;* and, that, the City of Hammond, as a municipal corporation, had, and has, no power, or authority, or right, under the law, to interfere with or molest respondent in the conduct of its business in the carrying of passengers for hire over the public highways and streets within said City, respondent being authorized so to do by the Certificates of Public Convenience and Necessity issued to it by said Public Service Commission of Indiana.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 570 to 607, inclusive.

NOTE: For the convenience of the Court, respondent has printed in this brief, as "Appendix B," so much of said Chapter 213 of the Acts of the Indiana General Assembly for the year 1925, in full, as is deemed necessary to the decision of this case, being a part of Sections 1, 9, 14, 33, 44, 45, 46, 47, 53, 62, and 63.

IV

Statutes, Their Method of Construction, Etc.

"Statutes passed at the same session of the Legislature the same as statutes generally on the same subject, are to be construed together, if possible; but if they are irreconcilable the later supersedes the earlier."

See: *Shay* v. *City of Muncie*, 148 Ind. 14 at p. 21.
Wright v. *Board, etc.*, 82 Ind. 335.

"All statutes upon the same subject are to be construed together."

See: *Conn.* v. *Board*, 151 Ind. 517 at p. 526.

Therefore, respondent contends that, as Chapter 46 of the Acts of 1925, Indiana General Assembly, relates to the *regulation of motor vehicles* when used for carrying passengers for hire on the public highways of the State of Indiana; and that said Chapter 213 of the Acts of 1925, Indiana General Assembly, also relates to the licensing, *regulation, and use of motor vehicles, including therein auto buses and motor vehicles used in the carrying of passengers for hire on the public highways of the State of Indiana*—that said statutes should be construed together; and, when so construed, reasonably mean,

First: That by said Chapter 46 the State of Indiana designated *a new agent,* namely: the Public Service Commission, *to control the regulation of carriers of persons by motor vehicles for hire on the public highways of the State;* and,

Second: That the jurisdiction, given to the Public Service Commission of Indiana, *is exclusive of all other agencies,* and that the City of Hammond, as a municipal corporation, *has no power or authority, or right, under the law, to interfere with, or molest, respondent in the conduct of its business in the carrying of passengers for hire over the public highways and streets within said City, respondent being authorized so to do by the Certificates of Public Convenience and Necessity, issued to it by the Public Service Commission of Indiana.*

V

In view of the provisions made for the regulation of motor vehicles, when used for carrying passengers for hire on the public highways of the State of Indiana, by said Chapter 46 of the Acts of 1925, Indiana General Assembly, and by said Chapter 213 of the Acts of 1925, Indiana General Assembly, it is fair to assume that it was the intention of the Legislature to withdraw all power and authority, and jurisdiction, which may theretofore

have been granted to municipalities in the State of Indiana as to the regulation of such motor vehicles, except reasonable police regulations within the boundaries of such municipality with reference to traffic on its streets, and the use thereof by the public. This would mean such regulations as with reference to right or left turns, one-way streets, stops at certain points where safety and local conditions require it, and such other matters of purely local concern, which affect peculiarly the municipality. Such regulations as these should be reasonable in character, and not designed to nullify and set aside the orders of the Public Service Commission by materially interfering with the efficiency of the utility, as authorized by the Public Service Commission.

See: *City of Nelsonville* v. *Ramsey*, Ohio Sup. Ct., June 9, 1925, 148 N. E. 694 at p. 696, Col. 1.
Newport Electric Corp. v. *Oakley*, Rhode Island Sup. Ct., June 24, 1925, 129 Atl. 613.
Helmer v. *Superior Court of Sacramento County*, Calif. Sup. Ct., August 9, 1920, 191 Pac. 1001 at pp. 1001 to 1003.
Dent v. *Oregon City*, Oregon Sup. Ct., January 2, 1923, 211 Pac. 909.
Parker v. *City of Silverton*, Oregon Sup. Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).
City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.
Ex parte Daniels, Calif. Sup. Ct., September 10, 1920, 192 Pac. 442 at pp. 444 to 445.

VI

The streets of a city belong to the people of the state as a whole, and every citizen of the state has a right to the use thereof, subject to legislative control. The right of control over street traffic is an exercise of a part of the sovereign power of the state. In some states this power, by the State Constitution, has been delegated to the

municipalities, but such *is not true in Indiana, where the right of control over street traffic, and upon the public highways of the State, is within the legislative control, solely.*

See: Vol. 3 Dillon on Municipal Corporations, 5th Ed., Par. 1122.
Farmers' & Merchants' Co-operative Telephone Co. v. *Boswell Telephone Co.*, 187 Ind. 371 at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203, at p. 209.

VII

In Indiana it is fundamental that the streets of a municipality are parts of the general highways of the state; and, as such, the State has primary control thereover when the interests of the public are concerned; and such power thereover, as municipalities may have when the interests of the general public are involved, are granted to the municipalities by the State, and may be withdrawn by the state. In effect, an agency for public welfare is thus established, and may be thus ended in the municipality.

By said Chapter 46 of the Acts of 1925, Indiana General Assembly, and by said Chapter 213 of the Acts of 1925, Indiana General Assembly, the State of Indiana withdrew from the municipalities of said State all such grants of power as such municipalities may have had theretofore, except in so far as said acts, expressly provided, might remain with such municipalities; and at the same time the State conferred upon a new agency, namely: the Public Service Commission of Indiana, the power of control over motor vehicle transportation for hire over the public highways of said State.

See: *Farmers', etc. Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371 at pp. 376 to 377.

See: Chapter 46, Acts of 1925, Indiana General Assembly, pp. 138 to 142.
Chapter 213, Acts of 1925, Indiana General Assembly, pp. 570 to 607.

(B) The United States District Court, for the District of Indiana, Erred in Refusing to Grant a Preliminary Injunction in This Cause, Enjoining the Petitioner City of Hammond from Enforcing Said Ordinance No. 1945 Shown in Evidence, and the United States Circuit Court of Appeals for the Seventh Circuit Rightly Reversed the District Court.

VIII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is in excess of the city's power to adopt, and is an unwarranted interference with the rights granted respondent under the Certificates of Public Convenience and Necessity granted to it by the Public Service Commission of Indiana. Said ordinance is also unconstitutional and void.

See: Printed Record, pp. 51 to 52, Ordinance.
Printed Record, pp. 16 to 17, Ordinance.
Bouge v. *Bennett*, 156 Ind. 478 at pp. 480 to 486.
Cicero Lumber Co. v. *Cicero*, 176 Ill. 9 (68 Amer. State Reports 155 at pp. 163 to 165).

(a) It is settled law, that, a municipal corporation can pass no ordinance which conflicts with any general statute in force.

See: Vol. 1, Dillon on Municipal Corporations, 5th Ed., Par. 237.
Vol. 2, Dillon on Municipal Corporations, 5th Ed., Pars. 601 and 602.

(b) "All doubtful claims to power are resolved against the city."

See: *Pittsburgh, etc., Ry. Co.*, v. *Town of Crown Point*, 146 Ind. 421.

(c) By said Ordinance No. 1945 the City of Hammond has undertaken to strike down the state laws of providing for the regulation of motor vehicle transportation of passengers for hire, as provided in Chapter 46 of the Acts of 1925, Indiana General Assembly, and also Chapter 213, Acts of 1925, Indiana General Assembly; and the Mayor, Chief of Police, and other city officials of the City of Hammond, as shown by the evidence, refuse to recognize respondent's rights, granted to it in the Certificates of Public Convenience and Necessity, provided for by said Chapter 46 of the Acts of 1925, Indiana General Assembly, and have undertaken, in the enforcement of said ordinance, to assert, and they do assert, that the powers remaining in said City of Hammond, are superior to those conferred upon the Public Service Commission of Indiana by the Legislature. This presents a direct conflict between the legislative will and the acts of said City of Hammond, through its Common Council and other officers; and, when an ordinance, or the acts of the officials of a city conflict with the general laws of the State, the ordinance, and acts of such officials, are void because they conflict with the laws of the State.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Pars. 601 and 602.
Vol. 1, Dillon on Municipal Corporations, 5th Ed., Par. 237.

(d) The City of Hammond was, and is, without power to pass an ordinance, prohibiting and preventing respondent from operating its motor buses in the carrying of passengers for hire on the public highways of the State of Indiana, in conflict with the grants and Certificates of Public Convenience and Necessity issued to it by the Public Service Commission of Indiana. This question has been, a number of times, decided by the courts of other states.

See: *Parker* v. *City of Silverton*, Oregon Sup. Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).

City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.

Ex parte Daniels, Calif. Sup. Ct., September 10, 1920, 192 Pac. 442 at pp. 444 to 445.

Dent v. *Oregon City*, Oregon Sup. Ct., January 2, 1923, 211 Pac. 909.

Helmer v. *Superior Court of Sacramento County*, Calif. Sup. Ct., August 9, 1920, 191 Pac. 1001 at pp. 1001 to 1003.

Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

City of Nelsonville v. *Ramsey*, Ohio Sup. Ct., June 9, 1925, 148 N. E. 694 at p. 696, Col. 1.

IX

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it expressly undertakes to burden, restrict, and prevent interstate commerce, in violation of the Commerce Clause of the United States Constitution; in fact, it is shown by the evidence in this case that respondent's business is principally interstate commerce, in the carrying of passengers between the states of Illinois and Indiana, and that by Section 1 of said ordinance the City of Hammond has undertaken to prevent respondent from operating its motor vehicles over Hohman Street, State Street, Sibley Street, and Fayette Street, within the business section of said City of Hammond; thus rendering it impossible for respondent to carry on its business of interstate commerce in and from said City without violating Section 1 of said ordinance; while by Section 2 of said ordinance, it is provided, that, respondent may not stop its motor vehicles, for the purpose of receiving or discharging passengers, on any of the streets of said City, unless, perchance, it can obtain, from the Board of Public Works of said City, a limited permit for so doing; and said Section further provides, that:

"And for vehicles engaged strictly in interstate commerce any street or public place north of 122nd Street and East of Calumet Avenue,"

which latter provision excludes respondent entirely from said City, or from coming within approximately four (4) miles of the built-up and business portion of said City. Such an ordinance is unreasonable and void, and directly conflicts with the Commerce Clause of the United States Constitution.

See: *Buck* v. *Kuykendahl*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303).
Bush & Sons Co. v. *Maloy*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305).
McNealy v. *Mayor and Board of Aldermen of City of Natchez*, C. C. A., 5th Cir., March 31, 1925, Fed. Rep., 2nd Series, Vol. 4, pp. 899 to 900.
Long, Mayor, v. *Miller*, C. C. A., 5th Cir., 262 Fed. 362.
Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

X

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it appears upon its face, that, *the primary purpose of said ordinance is not regulation, with a view to safety, or to conservation of the highways, but the prohibition of competition; it determines not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons while permitting it to others for the same purpose, and in the same manner; and it leaves the determination of granting permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of said City of Hammond.*

It is settled law, that, a state cannot forbid the use on its highways of motor vehicles, operated by common carriers for hire over regular routes in interstate commerce, merely because existing lines of transportation would be prejudiced thereby.

Therefore, respondent submits that, said Ordinance No. 1945 is unconstitutional and void, as being in direct conflict with the Commerce Clause of the United States Constitution; and also, violates the rights guaranteed to respondent by the 14th Amendment to the Federal Constitution.

See: *Buck* v. *Kuykendahl*, U. S. Sup. Ct., March 2, 1925, (Lawyers' Co-operative Publishing Co. Advance Opinions, No. 10, pp. 301 to 303).
Bush & Sons Co. v. *Maloy*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305).
Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

XI

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, by Section 2 of said ordinance it gives to the Board of Public Works of said City of Hammond *a naked arbitrary power to give, or withhold, the consent to stop and let off, or take on passengers on the streets and public highways in the City of Hammond, and makes respondent, and all others engaged in business of carrying passengers for hire by motor vehicles, even though engaged in interstate commerce, tenants at will as to their means of living under the said Board of Public Works, in violation of the 14th Amendment to the United States Constitution.*

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 to 374 (30 Law Ed. 220 to 228).

Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155, at pp. 163 to 165).
City of Tulsa v. *Thomas,* Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.
Bouge v. *Bennett,* 156 Ind. 478 at pp. 480 to 486.

XII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, and is unreasonable, in that, by Section 2 thereof it gives an uncontrolled power to the Board of Public Works of said City of Hammond to grant, or withhold, the privilege, as it may suit the pleasure of said Board of Public Works, to respondent or others in like circumstances, and fails to lay down any uniform rule of action governing the exercise of such dispensing power. In Indiana such an ordinance is clearly unconstitutional and void.

See: *Bessonies* v. *City of Indianapolis,* 71 Ind. 189 at pp. 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221 at pp. 225 to 227.
City of Richmond v. *Dudley,* 129 Ind. 112.
City of Plymouth v. *Schultheis,* 135 Ind. 339.
State v. *Gerhardt,* 145 Ind. 439 at pp. 479 to 493.
City of Elkhart v. *Murray,* 165 Ind. 304.
Bouge v. *Bennett,* 156 Ind. 478 at pp. 480 to 486.

XIII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, attempts to deprive respondent and others of a common right on the public highways. Travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their convenience; *hacks and omnibuses may stop to load or unload passengers.*

To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation, by automobile buses, of passengers

from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of a municipality to prevent or prohibit it.

See: Vol. 2, Elliott on Roads & Streets, 3rd Ed., Par. 1100.
13 Ruling Case Law, Subject: "Highways," p. 220, Par. 186.
Birdsell Mfg. Co. v. *Loughman,* 26 Ind. App. 359 at p. 361.
Parker v. *City of Silverton,* Oregon, Sup Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).

XIV

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void as a whole, each section thereof being dependent upon, and inter-related with, each and every section thereof. The ordinance, in its nature, is entire, and each part has a general influence over the rest. Therefore, the entire ordinance must be declared unconstitutional and void.

See: *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155, at pp. 163 to 165).

XV

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it unlawfully discriminates against respondent and others engaged in interstate commerce, in the carrying of passengers for hire. The Federal Constitution forbids the several states to discriminate in any way against the persons or property of other states, or against the use of products of other states, or against any one engaged in interstate business.

See: Vol. 7 CYC, p. 423, Subject: "Commerce."
Guy v. *Baltimore,* 100 U. S. 434 to 444 (25 Law. Ed. 743).

Grafty v. *City of Rushville,* 107 Ind. 502 at pp. 508 to 512.

Buck v. *Kuykendahl,* U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303).

Bush & Sons Co. v. *Maloy,* U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 303 to 305).

XVI

A municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, *the court, before which it is brought, must be able to see that it will tend to promote the public health, morals, safety, or welfare; that the means adopted are adapted to that end, and that it is impartial in operation, and not unduly oppressive upon individuals.*

See: 19 Ruling Case Law, pp. 805 to 806, Par 112.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle, is unreasonable, unconstitutional, and void.

XVII

If an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion, which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void because it fails to furnish a uniform rule of action, and leaves the right of property subject to the despotic will of the municipal officers, who may exercise it in accordance with some principle, which it would not be within the constitutional power of the state to sanction, or even

so as to give exclusive profits or privileges to particular persons.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Par. 598 at pp. 934 to 935.
19 Ruling Case Law, p. 813, Par. 118.
Yick Wo v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220 to 228).
Cicero Lumber Co. v. *Cicero,* 176 Ill. 9.
Bills v. *Goshen,* 117 Ind. 221.
Richmond v. *Dudley,* 129 Ind. 112.
City of Elkhart v. *Murray,* 165 Ind. 304.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle and authorities, is unconstitutional and void.

XVII

A city ordinance, so framed as to burden, control, interfere with, or regulate, a common useful, private business or occupation, though enacted as a police regulation, will be held unconstitutional and void where there is an arbitrary, unreasonable, or unwarranted interference with the constitutional rights of the private citizen to pursue a lawful business or calling.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle, is unreasonable, unconstitutional and void.

See: *Harrigan and Reid Co.* v. *Burton,* Mich. Sup. Ct., October 1, 1923, 195 N. W. 60.

XIX

In so far as said Ordinance No. 1945 of the City of Hammond, shown in evidence, burdens, impedes, prevents, or prohibits the carrying on of interstate commerce in the carrying of passengers for hire between the states of Illinois and Indiana, the fact that Congress has not as yet adopted any Federal Regulation, to govern motor transportation is immaterial, and will not save said ordi-

nance from being held unreasonable, unconstitutional and void, as being in conflict with the Commerce Clause of the United States Constitution; for, as to such interstate commerce in the carrying of passengers, the jurisdiction of Congress to regulate is exclusive, and the fact that Congress has not so far acted, is evidence that it is the intention of Congress that such interstate traffic shall remain unfettered, undisturbed, and without any burden cast upon it.

See: *Wabash, etc., Ry. Co.* v. *Ill.*, 118 U. S. 557 (30 Law Ed. 244 at pp. 250 to 251).

Buck v. *Kuykendahl*, United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303).

Bush & Sons Co. v. *Molay*, United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 303 to 305).

Newport Electric Corp. v. *Oakley*, R. I. Supreme Court, June 24, 1925 (129 Atl. 613).

City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.

McNealy v. *Mayor and Board of Aldermen of City of Natchez*, C. C. A., 5th Cir., March 31, 1925, Fed. Rep. 2nd Series, Vol 4, pp. 899 to 900.

XX

While it is well settled, that, if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections allowed to stand and be enforced; yet, where a portion of an act is valid and a portion invalid, and the court cannot say that the Legislature would have passed the act with the void portion eliminated, then the entire act must be held invalid.

Applying this principle to said Ordinance No. 1945 of the City of Hammond, shown in evidence, the entire

ordinance must fall, as being unreasonable, unconstitutional, and void.

See: *Springfield Gas., etc., Co.* v. *City of Springfield*, 292 Ill. 236 (126 N. E. 739 at pp. 742 to 743).
State ex rel Holt v. *Denny*, 118 Ind. 449 at pp. 475 to 480.
Spraigue v. *Thompson*, 118 U. S. 90 (30 Law Ed. 115 at p. 117, Col 1).

XXI

The passage of said Ordinance No. 1945 of the City of Hammond, shown in evidence, cannot be justified, and is not warranted under the proviso in Section 5 of said Chapter 46, Acts of 1925, Indiana General Assembly, which provides that:

> "In any city or town of this state where motor transportation is now furnished under or by color of a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate such service, and to determine when, if at all, for public convenience and necessity competing service shall be established,"

for said proviso is unconstitutional and void, as heretofore pointed out in this brief.

The purported classification is arbitrary and fanciful, and based solely on whether a contract has, or has not, been made, or on the incident of contiguity. There is no lawful distinction between cities or towns, purporting to come within such proviso, and those outside of it, based upon any natural or reasonable difference in transportation problems which the Legislature sought to regulate.

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30 Law Ed. 220 to 228).
Gulf-Colorado, etc., Ry. Co. v. *Ellis*, 165 U. S. 150 (41 Law Ed. 666 at p. 668).

XXII

Notwithstanding its lack of power, the City of Hammond, as shown by the evidence, adopted said Ordinance No. 1945 for the purpose of favoring the Calumet Motor Coach Company; and by said ordinance, the City has discriminated against, and has excluded, burdened, or restricted the operation of all other companies or persons engaged in carrying passengers for hire, both as to interstate and intrastate traffic, the City adopting, for its justification of such ordinance, the only distinction that the favored carrier has a contract, or color of contract, with the City. *The City had no power to make such a contract, or color of contract;* however, under the laws of Indiana, and the discrimination in the enforcement of said ordinance against respondent, and the failure to enforce the same against said Calumet Motor Coach Company, makes particularly applicable the following language of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* 118 U. S. 356:

> "In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons, as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, and to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in

appliance; yet, if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30 Law Ed. 220, at p. 227).

(C) The Points and Authorities and Argument of Petitioner Are Not Applicable to the Facts in the Instant Case and Each Authority Cited in Petitioner's Brief is Clearly Distinguishable Upon the Facts From the Facts in the Instant Case.

XXIII

An examination of the authorities cited in the petitioner's brief and petition herein show, that:

(a) None of the cases cited in petitioner's brief involve questions wherein Certificates of Public Convenience and Necessity had been issued to the bus company by the Public Service Commission of the State authorizing the bus company to operate in the carrying of passengers on the public highways of the state.

(b) None of the cases cited in petitioner's brief herein involve cases under statutes similar to the Indiana Statutes, Chapter 46, Acts of 1925, and Chapter 213, Acts of 1925, Indiana General Assembly.

(c) None of the cases cited in petitioner's brief herein involve ordinances similar to Ordinance Number 1945 of the City of Hammond.

(d) The excerpts from the authorities cited in petitioner's brief herein, when taken apart from the facts in the particular case from which the same are taken,

are misleading when attempt is made to apply them to the facts in the instant case.

(e) No case has been cited in petitioner's brief wherein any court of last resort has held that a municipality could, by ordinance, either directly or indirectly, nullify the Certificates of Public Convenience and Necessity issued by the Public Service Commission of the State, authorizing a bus company to transport passengers over the public highways.

But, see the following cases cited in respondent's brief herein:

Parker v. *City of Silverton,* Oregon Supreme Court, November, 1923 (220 Pac. 139), 31 A. L. R. 589 at p. 593, Col. 2.
City of Tulsa v. *Thomas,* Okla. Supreme Court, April, 1923 (214 Pac. 1070).
Newport Electric Corp. v. *Oakley,* R. I. Supreme Court, June 1925 (129 Atl. 613).
Ex Parte Daniels, Calif. Supreme Court, September, 1920 (192 Pac. 442 at pp. 44 to 445).
Dent v. *Oregon City,* Oregon Supreme Court, January 1923 (211 Pac. 909).
Helmer v. *Superior Court of Sacramento County,* Calif. Supreme Court, August, 1920 (191 Pac. 1001 at pp. 1001 to 1003).
City of Nelsonville v. *Ramsey,* Ohio Supreme Court, June, 1925 (148 N. E. 694 at p. 696, Col 1).

XXIV

Petitioner's contentions relating to a franchise carrier are beside the question, and not within the facts and law applicable to the instant case. No law exists in the State of Indiana, either statutory or otherwise, authorizing a municipal corporation to grant a franchise to transport passengers by motor vehicles for hire on the public highways of the State of Indiana.

Mere general statutory powers of a municipal corporation are not sufficient to authorize the granting of a franchise.

See: *Eichels* v. *Evansville Street Ry. Co.*, 78 Ind. 261, at p. 263.
Pittsburgh, etc., Ry. Co. v. *Town of Crown Point*, 146 Ind. 421.
Logan v. *Pine*, 43 Iowa 524 (22 Amer. Reps. 261, at p. 263).
Elizabeth City v. *Blanks*, 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
City of Dallas v. *Gill*, Texas Civil Appeals 1918 (199 S. W. 1144).

ARGUMENT

The record in the instant case presents for decision, in substance, the question whether or not rspondent, having obtained, from the Public Service Commission of Indiana, Certificates of Public Convenience and Necessity, specifically authorizing and empowering respondent to carry on such business within said State of Indiana, and within said City of Hammond, and over the streets and highways of said State as specified in such Certificates of Public Convenience and Necessity, can lawfully be prevented from carrying on such business by the petitioner, City of Hammond. The evidence shows, that, the principal part of respondent's business is interstate in the carrying of passengers between the states of Illinois and Indiana; but, that, it also does, and is authorized by such Certificates of Public Convenience and Necessity received from the Public Service Commission of Indiana, to do intrastate business over certain routes in the City of Hammond, and in the City of East Chicago, Indiana.

Respondent has complied with all the requirements and laws of the State of Indiana relative to such business; and, has likewise complied with all the laws and requirements of the State of Illinois; but the City of Hammond, a municipal corporation, has undertaken to prevent respondent from carrying on such business in and within said City, notwithstanding the authorization obtained by respondent from the Public Service Commission of Indiana.

In the recent case of *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925 (Lawyer's Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303), the Court held, that:

> "A state cannot prohibit the use on an interstate highway of auto vehicles by common carriers for hire over regular routes, without securing a certificate from a public official declaring that public convenience and necessity require such operation."

The difference is at once noticeable. The Supreme Court there held that even the Certificate of Public Convenience and Necessity was not necessary to the carrying on of interstate commerce; and that the state, even though such certificate had not been obtained, could not interfere.

In the instant case the state has granted to respondent the Certificates of Public Convenience and Necessity, by which respondent is authorized, by the State of Indiana, to do the very business which the City of Hammond attempts to prevent.

Also, in the recent case of *George W. Bush & Sons Co.* v. *William Maloy,* United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, at pages 303 to 304), the Court held, that:

> "A state cannot forbid the use on its highways of motor vehicles, operated by common carriers for hire over regular routes in interstate commerce, merely because existing lines of transportation would be prejudiced thereby."

In deciding the case of *George M. Bush & Sons Co.* v. *William Maloy,* supra, at page 304, the Court, speaking by Justice Brandeis, said:

> "This case presents two features which were not present in *Buck* v. *Kuykendahl,* decided this day • • • the first is, that, the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck case. The Federal aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, *but because those acts make*

clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission; not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference, also, is not of legal significance in this connection. The state action in the Buck case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred, arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved, by the Commerce Clause, for Federal Regulation."

So it is in the case at bar. The City of Hammond has undertaken to invade a field reserved, by the Commerce Clause of the United States Constitution, for Federal Regulation, and has passed an ordinance, shown in evidence, by which it, as a municipal corporation, has undertaken to regulate interstate commerce between the states of Illinois and Indiana, and other states; and it is enforcing such ordinance through its police department, to the destruction of respondent's business. Yet, the United States District Court, for the District of Indiana, refused to protect respondent, by denying to respondent the preliminary injunction as prayed for.

The State of Indiana, through the Public Service Commission, granted to respondent Certificates of Public Convenience and Necessity, covering all the routes over which respondent operates its motor vehicles within said state, whether the same be used in intrastate or interstate business. This action of the Public Service Commission of Indiana is in accordance with the very recent decision of the Supreme Court of Rhode Island in the case of *Newport Electric Corporation* v. *Oakley*, decided June 24, 1925 (129 Atl. 613), wherein the Supreme Court of said state held, that, it was proper for the state to

grant such certificates covering both interstate and intrastate traffic. The Court, on this point, at page 614, said:

> "The certificate cannot be withheld from a person about to engage in interstate commerce on the ground that the public is being adequately served over the proposed route, or that public convenience and necessity do not require the contemplated service. A state can not regulate competition in interstate commerce. Since this cause was commenced in the Federal Supreme Court, in an opinion rendered March 2, 1925, *Buck* v. *Kuykendahl*, 45 Sup. Ct. 324, held that, a statute, which prohibits common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without first having obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation, violates the Commerce Clause when applied to persons engaged in interstate commerce, and we agree with the respondent in his contention that to withhold from a person, about to engage in interstate commerce, a certificate on the ground that he is not a citizen resident within this state, is forbidden by the Commerce Clause. A state statute affecting interstate commerce, which discriminates in favor of citizens of other states, is void as an interference with, and placing a burden upon interstate commerce amounting to regulation."

And the Supreme Court of Rhode Island, at page 614, further said:

> "It is unimportant that Congress has failed to act. As the subject admits of, and requires, uniform regulation, it is exclusively within the National domain, and non-action by Congress indicates its will that such commerce shall be free and untrammeled. (Citing many cases.)"

Applying the foregoing principles to the instant case respondent contends, that, the entire action of petitioner, City of Hammond, including the passage of the ordinance shown in evidence, is unlawful and in direct conflict with

respondent's rights, guaranteed by the Constitution of the United States; and, further, that its acts are in direct conflict with the Commerce Clause of the United States Constitution.

The action of petitioner, City of Hammond, thus being clearly unlawful and in violation of the Constitutional provisions, respondent was entitled to a preliminary injunction.

By Chapter 46, pages 138 to 142 of the Acts of the General Assembly for the State of Indiana, for the year 1925, the State placed the jurisdiction over common carriers, engaged in carrying passengers for hire on the public highways of the State, in the Public Service Commission of Indiana.

In the "Brief of Argument" we have outlined the several provisions of this Act, and in "Appendix A" to this brief, we have copied the Act in full. In substance, it may be said that, this Act gives jurisdiction to the Public Service Commission of Indiana to control carriers of passengers for hire upon the public highways of the state, by means of certificates to be issued, authorizing such traffic, and requiring insurance to compensate for damages to any one injured, either in person or property, by reason of such operation, and by other provisions contained in said Act.

From an examination of the entire act it is evident that it was the intention of the Legislature to place the entire subject of such carriers under the jurisdiction of the Public Service Commission, for, the title of the act is as follows:

> "AN ACT to Regulate Certain Carriers of Persons and Property by Motor Vehicle for Compensation on the Public Highways of the State of Indiana, etc."

In Section 5 of said act, however, the following proviso is inserted:

> "Provided further, that in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate *such service;* and to determine when, if at all, for public convenience and necessity, competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to an appeal to, and review by, the Circuit or Superior Courts of the County upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court."

Respondent contends, that, this proviso is unconstitutional and void—

First: Because from the title of the act no such proviso is indicated, nor included in the subject contained in the title.

Second: Because it is an attempt to pass a local or special law, creating an arbitrary classification of cities and towns, without any reasonable or just relation to the subject matter of the act for such classification.

Third: That it denies to the inhabitants of the City of Hammond, the patrons of respondent, and to respondent, the equal protection of the laws afforded by the act, giving jurisdiction to the Public Service Commission of Indiana; and,

Fourth: That said proviso attempts to give to the City of Hammond, and such cities or towns that might claim to fall within the proviso, privileges or immunities which are not granted to other citizens, and cities

and towns, of the State of Indiana, upon the same terms, in violation of Section 23, Article I, of the Indiana Constitution.

Respondent contends, that, each and all of these objections to said proviso are well taken.

Section 19 of Article IV of the Indiana Constitution requires that:

> "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title."
>
> See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Sec. 115.

Sections 22 and 23 of Article IV of the Indiana Constitution, being Sections 118 and 119 of Volume 1, Burns', supra, forbids the passage of local laws, and requires that all laws shall be general and of uniform operation throughout the State.

In the "Brief of Argument" we have cited numerous Indiana decisions, construing these several sections of the Indiana Constitution, which counsel for respondent contends sustain respondent's view, and show conclusively that said proviso is unconstitutional and void. To these authorities we most respectfully refer the Court.

The classification of cities or towns, made in this proviso, is in fact no classification. It is arbitrary and fanciful, without any real basis or foundation therefor. It may be said to be based solely on whether a contract, or color of contract, has been made, or on the mere incident of contiguity. There is no distinction between cities coming under such proviso and those outside of the same, based upon any natural or reasonable difference in transportation problems, which the law seeks to regulate.

In the case of *Gulf-Colorado, etc. Ry. Co.* v. *Ellis*, 165 U. S. 150 (41 Law Ed. 666) considering the question of classification, the Court held:

"Classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification."

Tested by this principle the proviso must fall.

In *School City of Rushville* v. *Hayes*, 162 Ind. 193, in considering the question of classification, required by Section 23 of Article IV of the Indiana Constitution, at pages 201 to 202, the Court said:

"Inferior in dignity and force of obligation only to the Constitution of the United States and the Acts of Congress, and treaties made under it, the State Constitution is the supreme law of the Commonwealth. It is to be interpreted and applied in a reasonable manner. It is to be observed and obeyed and not evaded and defeated by distinctions and classifications which rest upon no rational or natural basis, and which deceive no one. When it declares that the General Assembly shall not pass local or special laws, providing for supporting common schools, and for the preservation of school funds, its mandate cannot be defeated by creating a class of cities differing in no material respect from scores of others in the state. The mere convenience of local communities, the financial necessities of particular cities, the conflicting views of citizens on the subject of necessity for the erection of school buildings, are not sufficient to authorize legislation which the Constitution prohibits. Attempted evasions of the Constitution, the object of which is to meet and overcome such local and special conditions, cannot be tolerated. A due regard for the highest interests of the citizens of the state requires that all constitutional limitations and restrictions shall be firmly and constantly enforced.

"In *Gulf-Colorado, etc. Ry. Co* v. *Ellis*, 165 U. S. 150, 159; 17 Sup. Ct. 255 (41 Law Ed. 666) the Court said:

'But arbitrary selection can never be justified by calling it classification. The equal protection,

demanded by the Fourteenth Amendment, forbids this.'

"In *State* v. *Ellis*, 115 Mo. 307, 314; 22 S. W. 350 (21 L. R. A. 789) quoted with approbation in *Gulf, etc. Ry. Co.* v. *Ellis*, supra, it was said by Black, J.:

"'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences, which would serve for a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The difference, which will support class legislation, must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land.'"

So it is in the instant case, as respondent contends. The mere fact, if it be a fact, that some small town or municipality has entered into a contract, or color of a contract, for motor transportation, ought not to be sufficient to justify a classification exempting such town or municipality from the operations of a general law, intended to regulate the carrying of passengers for hire over each and all of the public highways of the state.

Counsel for respondent press the consideration of the unconstitutionality of this proviso in Section 5 of the act upon the Court's attention for the reason, that, it may be argued by appellee that, under this proviso in Section 5, the acts of the City of Hammond, in attempting to oppress respondent, may be justified, and that such proviso should be so construed, as to authorize the passage of the ordinance under which petitioner City purports to act in its oppression of respondent; but, respondent contends, that, such a position is, and must be, held to be untenable; because the very proviso itself

is in conflict with both the State and Federal Constitution, as herein pointed out; and, further, that the ordinance is unconstitutional and void and in no way authorized by the proviso, even though the proviso, in and of itself, should be held valid.

In *Town of Longview* v. *City of Crawfordsville,* 164 Ind. 117, the question of classification of cities was before the Indiana Supreme Court, wherein an act, providing that cities having a population between six and seven thousand, and not operating under a special charter, may annex territory, including towns within such territory, and consolidate such towns with such cities, but the Supreme Court of Indiana held that such an act, or attempted classification, was arbitrary and special; and further held, that:

> "Where classification of cities, for the purpose of enacting laws to govern same, is permitted by the Constitution, such classification must be one which, in the nature of things, suggests and furnishes reasons therefor, and justifies the making thereof. Such classification must not be unnatural, artificial, arbitrary, or founded upon isolation alone."

Under the proviso in Section 5, although the cities are identical in size and traffic problems, this proviso attempts, by an arbitrary and fanciful method of classification, to exempt certain cities and towns from the operation of the general law. Such a proviso affords no ground for a classification; and, in fact, the proviso might also be said to be void for uncertainty; for, what, in fact, is to be understood from that portion of the proviso which says that:

> "In any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and town contiguous thereto."

Can the Court say that such language means carriers of persons and property by motor vehicles for compensa-

tion on the public highways of the State of Indiana, as specified in the title to said act?

Is it intended, by this portion of the proviso, to give to some cities and towns extraterritorial jurisdiction as to contiguous towns and cities?

Does "motor transportation" necessarily mean the carrying of persons and property by motor vehicle for compensation on public highways of the State of Indiana?

It seems to us that the proviso, in and of itself, is so uncertain as to be void for uncertainty, when found as a part of an act that purports to give jurisdiction to the Public Service Commission of Indiana, to regulate the carrying of passengers and property by motor vehicles for compensation on all the public highways of the state. Such proviso, if given effect, is in conflict with the evident purpose of the Legislature, as disclosed by the entire act.

What is intended in the proviso by the phrase, "under, or by color of, a contract"? May it be said that mere verbal permission from the public authorities in some town or city gave color of a contract to operate as a common carrier of passengers on the public highways of the state, outside of the jurisdiction intended to be given to the Public Service Commission?

Is there such a thing in law as "under or by color of a contract"? We have "express contracts"; we have "implied contracts," but do we have "color of a contract," that has any real legal meaning?

"Color" in a pleading is said to mean an apparent, but legally insufficient ground of action. "Color of office" is said to be a pretense of official right. Can it be said that upon a mere pretense of "color of contract," so-called, that a city or town may claim to be without the jurisdiction of the Public Service Commission in a mat-

ter so important as the regulation of the carriers of passengers as common carriers on the public highways of the state?

The Indiana Legislature, at its 1925 Session, evidently intended to cover the entire subject of regulation of automobile traffic; for, in addition to said Chapter 46 of the Acts of 1925, the Legislature also passed an Act comprised of sixty-three sections, and repealing all laws in conflict therewith, by which provision is made for the regulation of the use and operation of automobiles upon the public highways. This act makes numerous provisions regarding motor vehicles used in the carrying of passengers for hire defining them as "auto buses," making provision for the licensing and control of motor vehicles, engaged in both intrastate and interstate transportation of passengers; and, by Section 45 of said Act expressly withdrew from all cities, towns, and municipalities of the State, all power and authority regarding the use of motor vehicles upon the public highways, except such as said Act permitted such towns and cities, or municipalities to retain.

In the "Brief of Argument" we have analyzed the provisions of said Chapter 213 of the Acts of 1925, and in "Appendix B" set forth all the provisions of said Act, which we deemed necessary to a decision of this case. The important point being, however, that it is evident from a consideration of Chapter 46, and Chapter 213, of the Acts of 1925, that it was the evident intention of the Legislature of Indiana to completely cover and provide for automobile regulation, and as to auto buses or motor vehicles, used in the carrying of passengers on the public highways for compensation, it gave the Public Service Commission of Indiana jurisdiction exclusively to license and control the same.

It is a settled principle of statutory construction that all statutes upon the same subject are to be construed

together. Therefore, it is right and proper that the Court should consider both of these enactments in determining the purpose of the Legislature regarding automobile regulation within the State.

In *Dent* v. *Oregon City*, Supreme Court of Oregon, January 2, 1923 (211 Pac. 999), it was held that the act of the Legislature of that state, giving the Public Service Commission power to regulate transportation companies on public highways, repealed all charter powers theretofore granted to municipalities in said state in conflict with said act. Such must have been the evident intention of the Indiana Legislature in passing Chapter 46 and Chapter 213 of the Acts of 1925.

See also: *City of Nelsonville* v. *Ramsey*, Ohio Supreme Court, June 9, 1925 (148 N. E. 694 at p. 696 Col. 1).

In Indiana the streets of a city belong to the people of the state as a whole, and the right of control over street traffic is in the state, not the municipality. In some states it is true this power, by the State Constitution, has been delegate to the municipalities, but such is not true in Indiana, where the right of control over street traffic and upon the public highways of the state is within the legislative control, solely. This control may be withdrawn, if delegated to one agency, and bestowed upon a new agency at any time by the State Legislature, either with or without the consent of any such municipality.

See: *Farmers' & Merchants' Co-operative Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371, at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203 at p. 209.

By Chapter 46 of the Acts of 1925, Indiana General Assembly, the Legislature withdrew from the municipalities of the State all control over common carriers of passengers for hire by motor vehicles, and gave the juris-

diction over same to the Public Service Commission of Indiana. This is clearly the purpose of the act, with the evident intent of giving a uniform regulation throughout the state, and avoid and prevent conflict between the operators of auto bus transportation, if the control of the same had been left with the many cities, towns, and municipalities within the State.

The Ordinance No. 1945 of the City of Hammond, shown in evidence, and under which ordinance said City purports to act in interfering with respondent, was passed by the Common Council of the City of Hammond, and became effective, May 23, 1925, after both Chapter 46 and Chapter 213 of the Acts of 1925, Indiana General Assembly, were in force. Therefore, if said ordinance conflicts with the provisions of said enactments of the State Legislature, as respondent contends that said ordinance does, then it is void, as being in conflict with the statute of the State; for, it is settled law that a municipal corporation can pass no ordinance which conflicts with any general statute in force.

It is also settled law, that:

> "All doubtful claims to power are resolved against the city."

In the instant case we have the agent, the City of Hammond, claiming to have power greater than its principal, the State; claiming, also, that the State cannot withdraw any supposed delegated authority, which had once theretofore been delegated to the agent by the State. Such claims are in direct conflict with the law of the State, as declared by the Supreme Court of Indiana many times.

See: *Farmers' & Merchants' Co-Operative Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371, at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203 at p. 209.

By said Ordinance No. 1945 petitioner, City of Hammond, has undertaken to strike down the state laws providing for the regulation of motor transportation of passengers for hire, as provided in said Chapter 46, and to assume unto itself an authority greater than the State has granted to the Public Service Commission of Indiana. This presents a direct conflict between the State of Indiana, as represented by the Public Service Commission, and the City of Hammond, as a municipal corporation within said State.

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others:

First: Those granted in express words.

Second: Those necessarily or fairly implied in or incident to the powers expressly granted.

Third: Those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. They can exercise no powers but those which are conferred upon them by the act, by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from nature of corporations, the mode in which they are organized, and in which their affairs must be conducted.

See: Vol. 1, Dillon on Municipal Corporations, 5th Ed., Sections 237 to 238.

Therefore, respondent submits that the City of Hammand was, and is, without power to pass an ordinance such as said Ordinance No. 1945, for there is no statutory authority under which the City of Hammond may act, and its passage is not necessary to the carrying out of its corporate purposes and existence.

The City of Hammond has no implied powers except as to its corporate existence, and it must be remembered that the City of Hammond in the instant case is not only in conflict with respondent, but is in direct conflict with the State itself, through the State's duly authorized agent, and to whom jurisdiction has been given to regulate transportation by motor vehicles on the public highways of the State.

In *Parker* v. *City of Silverton*, Oregon Supreme Court, November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2), the Court, having a similar question before it, said:

> "In order for plaintiff to transport passengers for hire between Salem and Silverton, as authorized by the Public Service Commission, it is necessary for him to receive and discharge his passengers upon the public streets of Silverton. He is authorized to transport them to and from Silverton, and he cannot be compelled to receive and discharge them outside of the corporate limits of that city. *To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation by automobile buses of passengers from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of a municipality to prevent or prohibit it.* This provision of the ordinance, as well as some of the others hereinabove alluded to, is in direct violation of the provisions of the statute, and is therefore illegal and void."

In *City of Tulsa* v. *Thomas*, Oklahoma Supreme Court, April 24, 1923 (214 Pac. 1070), the Supreme Court of that State had before it a similar question as to an ordinance of the City of Tulsa, and among other things, the Court, at page 1071, said:

> "In the second place, the Court did not consider the application of the 1919 statute which, in terms, we believe, *creates an absolute vested right to the*

use of public streets of any municipality for the purpose of conducting the business of carrying passengers for hire, subject only to the right to reasonable regulation. Prior to the passage of the 1919 statute it might be held that, under the weight of decisions cited, that no vested right to use the streets for such purposes did exist, but we believe that the passage of the statute was sufficient to change materially the status of the situation. In view of the exercise of the Supreme Legislative body of this State in giving a statutory right to conduct the jitney business on the public highways, we believe that the municipal legislative bodies are limited to the provisions of that act, and could only be permitted to exercise reasonable regulation and control for the preservation of public safety, as authorized by the statute.

"From the provisions of the ordinance, as hereinabove presented, we reach the conclusion that the City Commission of the City of Tulsa exceeded its authority as granted to it by the Legislature.

"The case of *Yick Wo* v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220), involving the passage of a city ordinance in the City of San Francisco, limiting and regulating the conduct of the laundry business is singularly pertinent to the case at bar."

NOTE: (The Supreme Court of Oklahoma then proceeds to quote at length from the case of *Yick Wo* v. *Hopkins,* supra, basing its decision upon the holding of the Supreme Court of the United States in said case, all of which is equally applicable to the instant case. See *City of Tulsa* v. *Thomas,* supra, at pages 1071 and 1073.)

Applying the reasoning of the Supreme Court of Oklahoma in the City of Tulsa case, supra, we wish to call the Court's attention to Section 2 of Chapter 46 of the Acts of 1925, Indiana General Assembly, in question. It will be noted that, by said Section 2, the Certificates of Public Convenience and Necessity, authorized by the Legislature, *are recognized as property,* that portion of said Section 2 being as follows:

"That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the State for a period of ninety days immediately prior to the taking effect of this act, and is engaged in such operation at the time of filing application therefor, *shall receive from the Public Service Commission a certificate of convenience and necessity to continue such operation, upon submitting to the Public Service Commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provisions of Section 3 of this act, and any certificate owned, held, or obtained by any such carrier may be sold, assigned, leased, bequeathed, or transferred as other property upon approval by the Commission.*"

Three of the Certificates of Public Convenience and Necessity, received by respondent from the Public Service Commission of Indiana, were issued to it under the express provisions of Section 2 of said statute, as a ninety-day operator; in fact, respondent was a carrier of passengers for hire for years before the passage of said act, but was only required to show a continued operation for ninety days prior to the taking effect of the act in order to come within its provisions. This it did, and received from the Public Service Commission of Indiana, under the express provisions of Section 2 of said act, Certificate 324-M (Printed Record, pp. 35 to 38); Certificate 326-M (Printed Record, pp. 45 to 48); and Certificate 327-M (Printed Record, pp. 48 to 50). It also, upon a public hearing, in accordance with the provisions of Section 2 of said act, received its fourth and further Certificate Number 325-M (Printed Record, pp. 39 to 44).

But, notwithstanding the aforesaid facts, the City of Hammond has undertaken to strike down respondent's rights thus granted to it by the Public Service Commission of Indiana, and to prevent respondent from operating under said Certificates, and is so doing, by means

of the police force of such city. Respondent was, therefore, without other remedy at law, or in equity, than to pray for an injunction to protect its rights and property; but the United States District Court, for the District of Indiana, denied such preliminary injunction, and in which respect respondent most respectfully submits, said Court erred.

That said Ordinance No. 1945 of the City of Hammond is unconstitutional and void, in so far as it attempts to interfere with respondent in the carrying on of interstate commerce, seems to be too clear to require extended argument. The case of *Buck* v. *Kuykendahl,* supra; *Bush & Sons* v. *Maloy,* supra, and other cases cited in the "Brief of Argument," most certainly settled this question in appellant's favor.

Again, the ordinance, if enforced, deprives respondent of its property without due process of law, and denies to respondent the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution; for respondent's Certificates of Public Convenience and Necessity, granted to it by the Public Service Commission, are expressly declared to be property, which may be transferred and sold as other property by Section 2 of said Chapter 46, Acts of 1925, Indiana General Assembly.

The Supreme Court of Oklahoma, in *City of Tulsa* v. *Thomas,* supra, at page 1073, quoting from the case of *Yick Wo* v. *Hopkins,* supra, said:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford to unequal and unjust discrimination in their administration, for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require

the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself with a mind so unequal and oppressive as *to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, and to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States.*"

In the instant case the ordinance, by its express provisions in Section 3, shows that it was intended, not to be operative generally; and the facts, shown in evidence, conclusively show that the ordinance was passed at the request of the Calumet Motor Coach Company; and, that, it is being enforced solely for the benefit of that company in an effort to prevent competition, and for no other purpose whatsoever.

Moreover, it appears, from an examination of the ordinance, and especially in view of the facts shown in evidence, that the primary purpose of the ordinance is not regulation, with a view to safety, or to conservation of the highways, but the prohibition of competition; for, it determines, not the manner of use, but the persons by whom the highways and streets may be used; it prohibits such use to the uncontrolled, arbitrary discretion of the for the same purpose and in the same manner; and it leaves the determination of granting the permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of the City of Hammond. Such ordinance, or such a law, had it been passed by the State Legislature of Indiana, was expressly condemned by the Supreme Court of the United States in *Buck* v. *Kuykendahl*, supra, where, at page 303, Justice Brandeis, speaking for the Court in construing the statute involved in that state, said:

"Its primary purpose is not regulation, with a view to safety, or to conservation of the highways,

but the prohibition of competition; it determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort through state officials to a test, which is peculiarly within the province of Federal action."

Also, the Supreme Court of the United States, in *George W. Bush & Sons Co.* v. *William M. Molay,* supra, speaking by Justice Brandeis, at page 304, said:

"The State action in the Buck case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred, arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved by the Commerce Clause for Federal Regulation."

The quotation, just made, from the opinion of Justice Brandeis in the Bush case, fairly shows that the court based its decision in that case upon the Commerce Clause of the Federal Constitution; but, that, it might, if necessary, have rested the opinion upon the arbitrary and unreasonable provisions of the statute. That Ordinance No. 1945 in the instant case is arbitrary and unreasonable, and should be held unconstitutional and void on that ground also, will sufficiently appear from an application of the opinion of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* supra.

Also, a case directly in point, it that of *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155 at pages 163 to 165) where a similar ordinance was held to be unconstitutional and void by the Supreme Court of Illinois, the Court, among other things, saying:

"The ordinance, in so far as it invests the Board of Trustees the discretion here indicated, is unreasonable. It prohibits that which, in itself and as a

general thing, is perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion when the whole matter should be regulated by permanent local provisions, operating generally and impartially. The ordinance is not general in its operation; it does not affect all citizens alike, who use traffic vehicles. It is only persons, driving traffic vehicles upon the boulevards without the permission of the Board of Trustees, who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the Board. It prescribes no conditions upon which the special permission of the Board is to be granted; thus, the Board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest a City Council, or a Board of Trustees, with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured. This position is sustained by the weight of authority."

The Indiana Supreme Court has many times condemned similar ordinances. The cases, so holding, we have cited in the "Brief of Argument," Point XII, and to which we most respectfully refer the Court.

Again, that it was the intention of the Indiana Legislature to withdraw and withhold from municipal corporations, and vest in the Public Service Commission of Indiana, jurisdiction over carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, most certainly appears from Chapter 46, Acts of 1925 Indiana General Assembly, cited herein and printed in Appendix A of this brief; and, also, the same further appears in Chapter 213, Acts of 1925, Indiana General Assembly, cited herein and printed in this brief as Appendix B, in so far as the same is applicable to the questions here involved. In other

words, these two chapters of the laws of Indiana, passed at the same session of the Legislature, show conclusively that it was the intention of the Legislature to regulate automobile traffic; the use of automobiles and motor vehicles fully within the State; making the regulation and control of the same state wide, rather than to leave the same to the regulation or control of any given municipality, which could but result in confusion. By Section 45 of Chapter 213, supra, the Legislature expressly declared void all ordinances theretofore or thereafter passed by any municipal corporation seeking to restrict the use of motor vehicles within the State.

Since this case was originally heard in the United States District Court the Supreme Court of Indiana, in two cases, has given effect to Section 45 supra, being Section 17 of the original Automobile Regulation Act of Indiana, and in each instance the Supreme Court has declared that unless the ordinance, sought to be passed and enforced by any municipality of the State, was within the exception expressed in said Section 45 such ordinance would be inconsistent and in conflict with the State law and, therefore, null and void and without the jurisdiction of the municipality to pass.

See: *Hoosier Mfg. Co.* v. *Berry,* Indiana Supreme Court, December, 1925 (149 N. E. 723 at p. 724, Col. 2).
Brownlee v. *City of Princeton,* Indiana Supreme Court, June, 1926 (152 N. E. 828 at p. 829, Col. 2 to p. 830, Col. 1).

Said Section 45 of Chapter 213, Indiana Laws 1925 above referred to, provides that:

> *"Except as herein otherwise provided, no city, town or other municipal corporation, shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws or resolution heretofore or hereafter made*

by any city, town or other municipal corporation within this State, by whatever name known or designated, in respect to, or limiting the use of, motor vehicles or motor bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect." (See: Appendix B in this Brief.)

The Legislature, by Chapter 213, Acts of 1925 supra, specifically defined a motor vehicle to include:

"automobiles, locomobiles, and all other vehicles propelled otherwise than by muscular power, except traction engines, tractors used exclusively in drawing or propelling farm machinery, road rollers, etc." (See: Appendix B, Section 1.)

The Legislature also defined auto bus to mean:

"Any motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates between terminii, either wholly within the corporate limits of a city or between towns or cities."

(See: Section 1, Chapter 213 Supra, Appendix B.)

By Section 4, Chapter 46, Acts of 1925 supra, the Legislature defined the term motor vehicle to mean:

"An automobile or other self-propelled vehicle not operated or driven upon fixed rails or tracks, including any trailer thereto attached, and the term public highway, as used in this act, means any public road, street, avenue or alley in the State of Indiana."

(See: Appendix A in this Brief.)

The Legislature, by defining the terms specifically used in said Chapters 46 and 213 supra, both passed at the same session of the Legislature, must be held to have had a definite purpose in mind to co-ordinate the two acts for the purpose of regulating motor vehicle traffic

within the State of Indiana, and particularly motor vehicle carriers of persons and property. Neither of the terms, "motor vehicle" nor "auto bus," as defined in either of the acts, fall within the exception expressed in Section 45 to Chapter 213 supra. Therefore, it follows, that applying the decisions of the Supreme Court of Indiana last above cited, that, while the Supreme Court of Indiana has not directly passed upon the construction of Chapters 46 and 213 supra to this date, that, when the Court is required to construe said Acts that they will hold as above that it is only something that is within the exception, if anything, that is left to the action of the municipality, and that all attempted action not wihin the exception, by ordinance or by whatever name used, is of no validity, regulating or attempting to restrict the use of motor vehicles. In other words, the Legislature must be held to have undertaken to regulate the subject of motor vehicle transportation, and when the Legislature has acted upon a subject matter its action must be held to be exclusive, particularly as to municipalities having no power except what is conferred upon them by express provision to be found in a legislative act. Municipalities are not given power in Indiana by the Constitution, but have only such powers as the Legislature sees fit to delegate to the municipalities by express legislative enactment.

The importance of the definition of terms used in Chapter 46 and Chapter 213 of the Acts of 1925, supra, cannot be overlooked, for, it is a settled rule of statutory construction, that:

> "Where the Legislature expressly states the meaning which is to be given to a term used in an Act, that meaning must be given to such terms as so used."

See: *Chicago & Eastern Illinois R. Co.* v. *State ex rel Ketcham,* 153 Ind. 138, at p. 139.

The only exceptions permitted by the Legislature in Section 45 of Chapter 213, supra, is to be found in the following sentence of said Section 45, supra, to-wit:—

> "Nothing in this Act contained shall be construed as affecting the power of cities, towns and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles, which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions of this Act."

(See: Appendix B in this Brief.)

The Legislature, having defined in said Chapter 213 supra, and given a particular meaning to auto bus and motor vehicle, *defining auto bus as a motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates,* etc., excludes the idea that such a motor vehicle would fall within the terms of either motor trucks or motor driven commercial vehicles. Moreover, the use of motor trucks and motor driven commercial vehicles, mentioned in the exception, is expressly limited by the exception to those used within the limits of such municipal corporations for public hire. A motor truck is not necessarily, either by general definition or by express definition, a motor vehicle used in the carrying of passengers for hire. Neither is a motor driven commercial vehicle, an auto bus, or motor vehicle used in the carrying of passengers for hire. Hence, unless we should attempt to attribute a meaningless use of definitions to the Legislature, we are forced to the conclusion that it was the intention of the Legislature to so define motor vehicles used in the carrying of passengers for hire that no conflict of jurisdiction might occur between the Public Service Commission of Indiana, to which jurisdiction was given expressly by Chapter 46

of the Acts of 1925 supra, over motor vehicles engaged in carrying persons and property for compensation on the public highways of the State, and the cities and towns of the State. This construction, respondent submits, accords with, and gives to, the acts of the Legislature, passed at the same session, a fair and reasonable construction and purpose. Any other construction of Chapters 46 and 213 supra, is to open the door to conflict between the Public Service Commission of Indiana and every city and town within the State. Therefore, rspondent most respectfully submits, that, the ordinance here in question is void for want of jurisdiction in the City of Hammond to enact the same. It is void in that it conflicts with the State and Federal Constitutions as herein pointed out. It is unreasonable and void because of its many discriminations. It is unreasonable and void in that it gives arbitrary power to the Board of Public Works without any uniform or general principle of guidance. It is unreasonable and void considered from any standpoint of law applicable to the facts in the instant case. It is in conflict with the Commerce Clause of the Federal Constitution. So, we submit, that the United States Circuit Court of Appeals was entirely right in saying in its opinion, that:

> *"There are several reasons why we are of opinion that the bill should not have been dismissed."*

The opinion and judgment of the United States Circuit Court of Appeals should be in all things affirmed.

Most respectfully submitted,

WILLIAM J. WHINERY,

Attorney for Respondent.

"APPENDIX A"

Complete Copy of Chapter 46, Acts of 1925, Indiana General Assembly, Pages 138 to 142 Inclusive.

CHAPTER 46

AN ACT entitled "An act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and declaring an emergency."

(S. 16. Approved March 4, 1925.)

MOTOR VEHICLE CARRIERS—DECLARED TO BE PUBLIC UTILITIES.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any motor vehicle, except as hereinafter provided, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana is hereby declared to be a public utility within the meaning of the act of the general assembly of the State of Indiana entitled: "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and, except as

herein provided, subject to all the terms and provisions of said act, in so far as the terms and provisions of said act may be reasonably applicable to such carriers.

PUBLIC SERVICE COMMISSION—CERTIFICATE OF CONVENIENCE AND NECESSITY—EXISTING CARRIERS.

SEC. 2. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the Public Service Commission of Indiana a certificate declaring that public convenience and necessity require such operation, and no certificate shall be issued except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operation by other motor vehicle common carriers. Such commission is empowered to adopt rules and regulations to govern applications for certificates of convenience and necessity and hearings thereon: *Provided, however,* That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefor, shall receive from the public service commission a certificate of convenience and necessity to continue such operation, upon submitting to the Public Service Commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provisions of section 3 of this act, and any certificate owned, held, or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission.

DAMAGES ARISING FROM NEGLIGENCE—BOND, INDEMNITY, INSURANCE.

SEC. 3. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until there shall have been filed with the Public Service Commission of Indiana, a bond, indemnity undertaking or policy of insurance, executed by a company, mutual association or reciprocal exchange legally authorized to execute such instruments in the State of Indiana and to the approval of said commission, guaranteeing the payment of all damages which may result from any and all accidents due to negligence in the use or operation of such motor vehicle, which bond, indemnity, undertaking or policy shall be payable to the State of Indiana, for the benefit of persons who may suffer personal injuries or property damages on account of such negligence, and shall be in such amount as shall be fixed by such commission at the time of granting a certificate of convenience and necessity for the operation of such motor vehicle.

DEFINITION OF "MOTOR VEHICLE" AND "PUBLIC HIGHWAY."

SEC. 4. The term "motor vehicle" as used in this act means an automobile or other self-propelled vehicle not operated or driven upon fixed rails or track, including any trailer thereto attached; and the term "public highway" as used in this act means any public road, street, avenue or alley in the State of Indiana.

VEHICLES TO WHICH ACT IS INAPPLICABLE—LOCAL CONTROL.

SEC. 5. None of the provisions of this act shall apply to the owning, operation, management or control of taxicabs, hotel buses, funeral buses or school buses or to owning, controlling, operating, or managing motor pro-

pelled vehicles the major use of which is for private business of the owners and the use of which for hire is only casual or occasional or under special contract or arrangement: and PROVIDED FURTHER, That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested persons filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court. A taxicab as the term is used herein means a motor vehicle while being used for the performance of a contract for the transportation of a passenger or passengers for hire to and from points chosen or designated by the passenger or passengers and running over any available route between said points; but not at the time being operated over or along a definite, advertised, announced or substantially fixed route from, to or between definite or substantially fixed terminals, locations or districts, or according to substantially fixed or announced times or interval of arrival or departure; and a hotel bus, as the term is used herein, means a motor vehicle operated by a hotel company, owner or proprietor in the conveyance of guests between such hotel and a railroad or interurban station.

STEAM OR ELECTRIC CARRIERS, MOTOR VEHICLES OF.

SEC. 6. Any motor vehicle engaged in transporting persons or property upon any of the public highways of

the state for any steam or electric common carrier between points on the railroad of such carrier or elsewhere, shall be regarded as a motor vehicle owned, operated, managed or controlled for the purpose of transporting passengers or property for compensation as a common carrier within the meaning of this act.

CONSTRUCTION OF THIS ACT.

SEC. 7. Each section of this act is independent of each of the other sections, and adjudication that any provision of this act is invalid shall not affect the validity of any other provision hereof, but such other provisions shall be and remain in full force and effect.

PENALTIES.

SEC. 8. Any person, firm or corporation which shall violate any of the provisions of this act or fail or refuse to obey any lawful order of the public service commission of Indiana made hereunder shall, on conviction, be fined not less than ten dollars or more than one hundred dollars for each offense, and each day such violation shall continue shall constitute a separate offense.

LEGAL AND EQUITABLE REMEDIES AVAILABLE FOR ENFORCEMENT.

SEC. 9. All legal and equitable remedies of a civil nature to enforce the provisions of this act or of any lawful order, rule or regulation made pursuant hereto may be used by said commission or any person or corporation having a special interest in such enforcement.

HIGHWAY COMMISSION—OTHER AUTHORITIES —JURISDICTION, POWERS.

SEC. 10. This act shall be supplementary to the act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the rail-

road commission on the public service commission," approved March 4, 1913: PROVIDED, HOWEVER, That none of the provisions of this act shall operate to deprive the state highway commission of Indiana or any other public authorities of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said state highway commission of Indiana or other authorities from suspending at any time, the right of motor buses to operate on any public highway where necessary to preserve said highway.

APPENDIX B

Copy of Parts of Chapter 213, Acts of 1925, Indiana General Assembly, Pages 570 to 607 Inclusive.

CHAPTER 213

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records, of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.

(H. 103. Approved March 14, 1925.)

DEFINITIONS.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, That the words and phrases used in this act are herewith defined and for the purpose of this act shall be construed as follows, except when otherwise expressly provided: The term "motor vehicle" shall be construed to include auto-

mobiles, locomobiles, and all the other vehicles propelled otherwise than by muscular power, except traction engines, tractors used exclusively in drawing or propelling farm machinery, road rollers, road and street sprinklers, motor vehicles running only upon rails or tracks, fire engines and wagons, municipally owned ambulances and police patrol wagons, but nothing in this act shall be construed to apply to or affect bicycles or tricycles or such other vehicles as are propelled exclusively by muscular power.

"Trailer" shall be construed to mean any vehicle without motive power designed for carrying property or passengers wholly on its own structure and being drawn by a motor vehicle.

"Semi-trailer" shall be construed to mean any vehicle without motive power designed for carrying property or animals and having two wheels and which is so attached to a tractor, truck or other motor vehicle that the load carried will rest partly on the semi-trailer and partly on the motor vehicle to which it is attached.

"Motor trucks and delivery cars" shall be construed to mean motor vehicles having bodies, beds, boxes or slip-on bodies attached thereon and used in carrying commodities, articles or merchandise of any kind.

"Motor bicycles" shall be construed to mean a bicycle having two wheels and propelled by a motor. The attachment of a side car shall not affect the classification or definition of the term.

"Chauffeur" shall be construed to mean any person acting as an employe, or part or all of whose regular duties require him to operate or drive a motor vehicle owned by his employer.

"Local authorities" shall be construed to include all officers of counties, cities or towns as well as all boards

and other public officials of such counties, cities and towns.

"State" as used in this act, except when otherwise expressly provided, shall also include territories and federal districts of the United States.

"Owner" shall be construed to also include any person, firm, association or corporation renting or leasing a motor vehicle and having exclusive use thereof for a period longer than thirty (30) days.

"Public highway" shall be construed to include any highway, country road, state road, public street, avenue, alley, park, parkway or public place in any county, city or town, except any speedway which may have been or may be expressly set apart by law for the exclusive use of horses and light carriages.

"Auto bus" shall be construed to mean any motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates between termini, either wholly within the corporate limits of a city or between towns or cities.

"Tractor" shall be construed to include tractors, tractor trucks, pull-wagons, steel mules or any motor device designed for drawing or propelling trailers, semi-trailers or vehicles of any kind, excepting those used exclusively in drawing or propelling farm machinery, grain and bean separators, clover hullers, ensilage cutters, corn shredders, corn hullers and portable sawmills.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 570 to 571.

REGISTRATION FEES.

SEC. 9. The fees hereinafter prescribed in this section shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle, motor bicycle,

tractor, trailer, semi-trailer, manufacturer or dealer or chauffeur for each calendar year: * * *

A fee of six dollars ($6.00) per person per annum, at the rated carrying capacity, allowing sixteen (16) inches for each person, exclusive of the driver, shall be paid upon the registration or re-registration, for each calendar year, for each motor bus operated for hire over any of the public highways of the state on a regular schedule of time and rates: PROVIDED, That the fee for motor buses operating wholly within the corporate limits of any city or town shall be one-tenth (1/10) of the regular registration fee for motor buses: PROVIDED, FURTHER, That motor vehicles used in the transportation of school children, whether the entire motor vehicle, including the body and chassis, or the body only, is owned by the school corporation, shall not be classed as motor buses, nor shall such motor vehicles be required to pay the seat fee as hereinbefore provided in this paragraph. * * *

The fee for owner's duplicate plates shall be fifty cents ($0.50) for each plate. A fee of ten dollars ($10.00) per person per annum at the rated carrying capacity, allowing sixteen inches (16") for each passenger, exclusive of the driver, shall be paid upon the registration or re-registration for each calendar year, for each motor bus operated for hire over any of the public highways of the state and engaged exclusively in interstate commerce: PROVIDED, HOWEVER, That motor buses engaged exclusively in interstate commerce shall not be authorized to operate upon and over the highways within the State of Indiana, until they have complied with all the general and special laws of the State of Indiana, pertaining to the operation of motor vehicles upon the public highways of this state: and, PROVIDED, That no motor bus or motor truck engaged exclusively in interstate commerce shall be authorized or permitted under its license, to en-

gage in interstate commerce within the State of Indiana, without having complied with all the provisions of the law concerning permits, certificates of convenience and necessity, and regulations of the transportation of interstate commerce.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 575 to 578.

STOP LIGHTS ON BUSES.

SEC. 33. Every motor bus used in transporting passengers for hire shall be equipped with a stop light, which shall be so attached and adjusted that when the service brakes of such motor bus are applied, a red light will be automatically displayed on the rear of such motor bus in such manner and with such distinctness that the operator of any motor vehicle which may be following in or approaching from the rear, will have adequate warning that such motor bus is about to stop or slow down.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 591 to 592.

NO FEES ON MOTOR VEHICLES AND MOTOR BICYCLES EXCEPT STATE FEES.

SEC. 44. No owner of any motor vehicle or motor bicycle except motor trucks, motor driven commercial vehicles, and motor vehicles used in transporting passengers for hire, who shall have obtained a certificate of registration (from the secretary of state, and who shall have paid the registration) fee, as hereinbefore provided, shall be required to pay another license fee whatsoever, or to obtain any other license or permit to use or operate any such motor vehicle or motor bicycle on the public highways, nor shall any such owner be required to display upon his motor vehicle or motor bicycle any other number

than that issued by the secretary of state, nor shall any such owner be excluded or prohibited from or limited in the free use of his motor vehicle or motor bicycle, nor shall he be limited as to the rate of speed, except as herein provided, at which he may drive upon any public highway at any time when such public highway is or may hereafter be opened to the use of persons having or using other vehicles.

MUNICIPAL REGULATIONS—CITY AND TOWN LICENSES.

SEC. 45. Except as herein otherwise provided, no city, town or other municipal corporation shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws, or resolution heretofore or hereafter made by any city, town or other municipal corporation within this state, by whatever name known or designated, in respect to or limiting the use of motor vehicles or motor bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect. Nothing in this act contained shall be construed as affecting the power of cities, towns, and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions of this act. A license issued by any city or town for any motor truck or motor driven commercial vehicle used for hire shall be valid in every city and town of the state for and during the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle for any one year.

PUBLIC PARKS — REGULATION OF MOTOR VEHICLES.

SEC. 46. Local authorities having jurisdiction over public parks shall not, by the terms of this act, be prohibited from adopting and enforcing reasonable ordinances, rules and regulations concerning the speed at which motor vehicles or motor bicycles may be driven or operated within the limits of any such park. Such local authorities shall, by signs conspicuously placed, indicate the rate of speed permitted by such ordinances, rules or regulations.

CEMETERIES—EXCLUSION OF MOTOR VEHICLES FROM.

SEC. 47. Motor vehicles or motor bicycles may be excluded from any cemetery or grounds used for the burial of the dead, by the authorities having jurisdiction over such cemeteries or grounds.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 597 to 598.

RIGHT OF WAY—PREFERENTIAL TRAFFIC STREETS AND HIGHWAYS—STOP INTERSECTIONS

SEC. 53. Except as hereinafter otherwise provided, every motor vehicle or motor bicycle traveling upon any public highway shall give the right of way to any other motor vehicle, motor bicycle or any other vehicle approaching along an intersecting highway from the right and shall have the right of way over those vehicles approaching along an intersecting highway from the left. Motor vehicles and motor bicycles operated by municipal police and fire departments, motor vehicles used in transporting the United States mails, and ambulances shall have the right of way over all other motor vehicles,

motor bicycles and other vehicles. The proper authorities of cities may designate certain streets or boulevards as preferential traffic streets and prescribe rules regulating the traffic crossing over or turning into such streets or boulevards, and such authorities shall likewise have the power to regulate the traffic at such points or street intersections where traffic officers or automatic signals are stationed. The state highway commission may designate certain state highways as preferential highways, and the traffic upon any such highway so designated shall have the right of way over the traffic crossing over or turning into such highways. The state highway commission shall also have the authority to designate any hazardous intersection as a "stop intersection," and to require all traffic approaching any such intersection to come to a full stop before passing over. Any such intersection designated as a stop intersection shall be indicated by appropriate signs or automatic signal devices, and if signs are used on any such highway they shall be erected not less than fifty (50) feet from the middle of the intersecting highway, and if such signs are erected on a road under jurisdiction of a board of county commissioners or a township trustee, such board of commissioners or township trustee is hereby prohibited from interfering with the erection of such signs or removing same.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 602 to 603.

PENALTY.

SEC. 59. Any person who shall violate any of the provisions of this act for which no specific penalty is provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars ($25) and not more than five hundred dollars ($500), to which may be added imprisonment for a term of not to exceed one year.

PARTIAL INVALIDITY.

SEC. 60. If any section, provision or clause of this act shall be declared invalid, the remainder of the act, not otherwise invalid, shall not be thereby affected.

FEES—WHEN EFFECTIVE.

SEC. 61. Section 9 of this act, prescribing the fees to be paid on the registration or re-registration of motor vehicles, motor bicycles, tractors, trailers, semi-trailers or chauffeurs shall be in effect for the year 1926 and thereafter.

REPEAL.

SEC. 62. That an act entitled "An act defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, and providing for punishment for the violation of any of the provisions of this act," approved March 15, 1913, and all acts amendatory thereof and supplemental thereto are hereby repealed.

EMERGENCY.

SEC. 63. Whereas an emergency exists for the immediate taking effect of this act, therefore this act, except section 9, shall be in full force and effect from and after its passage.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 606 to 607.

ALPHABETICAL LIST OF CASES CITED

A

Acts of 1925, Chapter 46, Indiana General Assembly, at pp. 138 to 142.
Acts of 1925, Chapter 213, Indiana General Assembly, at pp. 570 to 607.

B

Bessonies v. *City of Indianapolis,* 71 Ind. 189, pp. 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221, pp. 225 to 227.
Birdsell Mfg. Co. v. *Loughman,* 26 Ind. App. 359, p. 361.
Board v. *Johnson,* 173 Ind. 76, p. 87.
Bouge v. *Bennett,* 156 Ind. 478, pp. 480 to 486.
Brimmer v. *Rebman,* 138 U. S. 78 (34 Law Ed. 862.)
Brownlee v. *City of Princeton,* Indiana Supreme Court, June 1926 (152 N. E. 828 at p. 829, Col. 2 to p. 830, Col. 1.)
Buck v. *Kuykendahl,* U. S. Supreme Court, March 2, 1925 (Lawyers' Co-operative Pub. Co., Advance Opinions No. 10, pp. 301 to 303.)
Bullock v. *Robinson,* 176 Ind. 198, pp. 203 to 204.
Burns' Indiana Statutes, Vol. 1 Revision of 1914, Sections 118 and 119.
Bush & Sons Co. v. *Maloy,* U. S. Supreme Court, March 2, 1925 (Lawyers' Co-operative Pub. Co. Advance Opinions No. 10, pp. 303 to 305.)

C

Central Union Telephone Co. v. *Indianapolis Telephone Co.,* 189 Ind. 210 at p. 223.
Chicago & Eastern Illinois R. R. Co. v. *State ex rel Ketcham,* 153 Ind. 138 at p. 139.
Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 So. Amer. State Reports 155, pp. 163 to 165.)
City of Dallas v. *Gill,* Texas Civil Appeals 1918 (199 S. W. 1144.)

City of Elkhart v. *Murray*, 165 Ind. 304.
City of Nelsonville v. *Ramsey*, Ohio Supreme Court June 9, 1925 (148 N. E. 694, p. 696, Col. 1).
City of New Albany v. *New Albany Street R. R. Co.*, 172 Ind. 487 at p. 490.
City of Plymouth v. *Schultheis*, 135 Ind. 339.
City of Richmond v. *Dudley*, 129 Ind. 112.
City of Tulsa v. *Thomas*, Okla. Supreme Court, April 24, 1923 (214 Pac. 1070).
Conn v. *Board*, 151 Ind. 517, p. 526.

D

Dent v. *Oregon City*, Oregon Supreme Court, January 2, 1923 (211 Pac. 909).
Dickson v. *Poe*, 159 Ind. 492, pp. 494 to 498.
Dillon on Municipal Corporations, Vol. 1, 5th Ed., Par. 237.
Dillon on Municipal Corporations, Vol 2, 5th Ed., Pars. 601 to 602.
Dillon on Municipal Corporations, Vol. 2, 5th Ed., Par. 598, pp. 934 to 935.
Dillon on Municipal Corporations, Vol. 3, 5th Ed., Par. 1122.

E

Eichels v. *Evansville Street Ry. Co.*, 78 Ind. 261 at p. 263.
Elizabeth City vs. Banks, 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
Elliott on Roads and Streets, Vol. 2, 3rd Ed., Par. 1100.
Ex parte Daniels, Calif. Supreme Court, September 10, 1920 (192 Pac. 442, pp. 444 to 445).

F

Farmers' & Merchants' Co-operative Telephone Co. v. *Boswell Telephone Co.*, 187 Ind. 371, p. 376.

G

Gloucester Ferry Co. v. *Commonwealth of Pennsylvania*, 114 U. S. 196 (29 Law Ed. 158).
Grafty v. *City of Rushville*, 107 Ind. 502, pp. 508 to 512.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203 at p. 209.

Gulf, etc. Ry. Co. v. *Ellis,* 165 U. S. 150 (41 Law Ed. 666, p. 668).
Guy v. *Baltimore,* 100 U. S. 434 to 444 (25 Law Ed. 743).

H

Harrigan and Reid v. *Burton,* Mich. Supreme Court, October 1, 1923 (195 N. W. 60).
Helmer v. *Superior Court of Sacramento County,* Calif. Supreme Court, August 9, 1920 (191 Pac. 1001, pp. 1001 to 1003).
Henderson v. *London, Lancashire Insurance Co.,* 135 Ind. 23, pp. 24 to 31 incl.
Hoosier Mfg. Co. v. *Berry,* Indiana Supreme Court, December, 1925 (149 N. E. 723, at p. 724, Col. 2).

I

Indianapolis Northern Traction Co. v. *Brennen,* 174 Ind. 1, pp. 54 to 56.

L

Logan v. *Pine,* 43 Iowa 524 (22 Amer. Reps. 261 at p. 263).
Long, Mayor, et al. v. *Miller,* U. S. C. C. A., 5th Cir., 262 Fed. 362.

M

Marion Trust Co. v. *Bennett,* 169 Ind. 346, p. 350.
McNealy v. *Mayor and Board of Aldermen of City of Natchez,* U. S. CCA, 5th Cir., March 31, 1925 (Vol. 4 Fed. 2nd Series, p. 899, Advance Sheets No. 8 of June 25, 1925).
Mewherter v. *Price,* 11 Ind. 199, p. 202.
Michigan Public Utilities Commission v. *Duke,* U. S. Supreme Court, January 12, 1925 (Lawyers' Co-operative Pub. Co., Advance Opinions Nos. 6 and 7, pp. 207 to 209).

N

Newport Electric Corporation v. *Oakley,* R. I. Supreme Court June 24, 1925 (129 Atl. 613).

P

Parker v. *City of Silverton*, Ore. Supreme Court, November 13, 1923, 220 Pac. 139 (31 A. L. R. 589, p. 593, Col. 2).

Pittsburgh, etc., Ry. Co. v. *Town of Crown Point*, 146 Ind. 421.

R

Ruling Case Law, Vol. 13, Subject: "Highways," p. 220, Par. 186.

Ruling Case Law, Vol. 19, pp. 805 to 806, Par 112.

Ruling Case Law, Vol. 19, p. 813, Par. 118.

S

School City of Rushville v. *Hayes*, 162 Ind. 193, pp. 201 to 203.

Shay v. *City of Muncie*, 148 Ind. 14, p. 21.

Spaigue v. *Thompson*, 118 U. S. 90 (30 Law Ed. 115 p. 117 Col. 1).

Springfield Gas, etc. Co. v. *City of Springfield*, 292 Ill. 236 (126 N. E. 739, pp. 742 to 743).

State v. *Dorsey*, 167 Ind. 199, p. 204.

State v. *Gerhardt*, 145 Ind. 439, pp. 479 to 493.

State ex rel Holt v. *Denny*, 118 Ind. 449, pp. 475 to 480.

State ex rel Western Construction Co. v. *Board of Commissioners*, 166 Ind. 162, pp. 196 to 198.

T

Town of Longview v. *City of Crawfordsville*, 164 Ind. 117, pp. 121 to 125.

W

Wabash, etc. Ry. Co. v. *Illinois*, 118 U. S. 557 (30 Law Ed. 244).

Wabash R. R. Co. v. *Young*, 162 Ind. 108, pp. 103 to 105.

Wright v. *Board, etc.*, 82 Ind. 335.

Y

Yick Wo v. *Hopkins*, 118 U. S. 356 to 374 (30 Law Ed. 220 to 228).

End.